



Constitutional Court Appointments: USA, Canada, Germany

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TABLE OF CONTENTS

<u>ABSTRACT.....</u>	<u>ii</u>
<u>INTRODUCTION.....</u>	<u>1</u>
<u>CHAPTER I. THE COUNTER-MAJORITARIAN DIFFICULTY.....</u>	<u>4</u>
<u>CHAPTER II. INSTITUTIONAL FRAMEWORK.....</u>	<u>13</u>
2.1 Interference of Constitutional Courts with Parliaments.....	13
2.1.1 Constitutional review.....	13
2.1.2 Ancillary powers of Constitutional Courts	18
2.2 Interference of Parliaments with Constitutional Courts.....	18
<u>CHAPTER III. CONSTITUTIONAL COURT APPOINTMENT PROCESS: USA, CANADA, GERMANY.....</u>	<u>21</u>
3.1 Nomination of Candidates.....	23
3.2 Evaluation of Candidates.....	28
3.3 Appointment of Candidates	33
<u>CHAPTER IV. EVALUATION.....</u>	<u>35</u>
<u>CONCLUSION.....</u>	<u>40</u>
<u>BIBLIOGRAPHY.....</u>	<u>41</u>

ABSTRACT

The subject of this thesis is the review of Constitutional Court Appointment process as the process aimed at securing the balance in the constitutional court composition so that to preserve the independence of the constitutional court as one of the vital mechanisms of check and balances within the separation of powers in democratic state. The aim of this thesis is to argue in favor of more parliamentary involvement in the process of the appointment of Constitutional Court judges, while preserving the balance within the separation of powers by maintaining the status of constitutional court as arbiter entrusted the right of constitutional review by both executive and legislative branches of power. By conducting comparative review of the Constitutional Court appointment process in the United States of America, Canada and Germany the similarities and differences of the process will be reviewed from the view point of the “Counter-Majoritarian Difficulty” as the main theoretical concept considering the conflict between the popularly elected parliaments and appointed constitutional courts entrusted the right of “constitutional review” and having power of striking down the legislative acts adopted by the parliaments as representatives of people. It will be maintained throughout the thesis that the efforts should concentrate on finding the right balance between wider parliamentary involvement in the process of constitutional court judges appointment with aim of adding more legitimacy to the court to alleviate partially the conflict outlined within “Counter-Majoritarian Difficulty Concept” while preserving independence of the constitutional court from both, executive and legislative powers, to secure its role as one of the check and balances within separation of powers system.

INTRODUCTION

Constitutional court appointment process is the key element of constitutional courts formation intended to make the courts truly legitimate bodies trusted both, by legislator and executive power, with conducting constitutional review as part of check and balances system of the state. As Graham Gee stated, “[decisions such as who to appoint as judges and how to appoint them always have a ‘political’ dimension... [and their importance lies in the fact that] ...appointment processes shape the ability of courts to hold political institutions to account...”¹

The aim of this thesis is to argue in favor of more parliamentary involvement in the process of the appointment of constitutional court judges as the way helping alleviate the problems associated with so-called “counter-majoritarian difficulty”² concept. At the same time, it is also important to note that the contradiction outlined in the “counter-majoritarian difficulty”, and questioning the legitimacy of constitutional review conducted by the appointed judges of constitutional court as instrument of abolishing the acts adopted by popularly elected parliaments, cannot be ultimately resolved in pure favor of parliaments as, in this case, this may diminish the role of constitutional courts as one of check and balances mechanisms within the separation of powers in the state.

This statement will be substantiated in this thesis by conducting comparative review of the constitutional court appointment process in the United States of America, Canada and Germany, which will also highlighting of some problems associated with this process.

Constitutional court appointment process is the matter of interest and a subject of research for a vast majority of legal and political science scholars. Scholarly writings related

¹ Graham Gee, "The Politics of Judicial Appointments in Canada," in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (London: 2010), 99.

² Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (London: Yale University Press, 1986) 16.

to the topic of constitutional court appointments include both theoretical³ and practical⁴ considerations.

The chosen jurisdictions represent different models of the Constitutional Court appointment process and different types of constitutional review. The jurisdiction of Canada has been chosen, because of non-involvement of parliament in the process of judicial appointments at the early stages of the Canadian state and attempts to change this tradition that take place over the recent years in Canada.⁵ The United States Supreme Court appointment process also represents an interest for review as it involves the participation of both, the executive and the legislative branches, and therefore triggers the dialogue between them.⁶ The jurisdiction of Germany has been chosen for the fact that German Constitutional Court appointment process involves the most active participation of the legislative branch while having the participation of the executive power limited practically to administrative functions within this process⁷.

The review is based on the examination of a variety of sources, both primary and secondary. The comparative analysis includes examination of primary sources, such as Constitutions and associated normative acts.

The thesis consists of four chapters followed by the conclusion. The first chapter provides details of so-called “counter-majoritarian difficulty” a concept based on assumption that constitutional review is conducted by body formed of people not elected by popular vote while with authority to strike down the legal acts created by parliamentary bodies formed by

³ For theoretical considerations see for example, Eric Ghosh, "Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries," *Oxford Journal of Legal Studies* 30, no. 2 (2010): 327-59.

⁴ For practical considerations see for example, Christine Landfried, "The Selection Process of Constitutional Court Judges in Germany," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006), 196-213.

⁵ Gee, "The Politics of Judicial Appointments in Canada," 108-13.

⁶ Jack K. Knight Lee Epstein, Olga Shvetsova, "Comparing Judicial Selection Systems," *William and Mary Bill of Rights Journal* 10, no. 7 (2001): 16.

⁷ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 196-208.

the people's vote and thus representing legitimate majority.⁸ The second chapter describes the institutional framework within which the parliaments and constitutional courts interrelate with each other. This chapter is comprised of two sub-chapters: sub-chapter one showing how constitutional courts interfere with parliaments with sub-chapter two showing parliaments to interfere with constitutional courts. The third chapter is dedicated to review of three major stages of the appointment process in their relation to three legislations chosen as models for this review, USA, Canada and Germany. This Chapter is subdivided into three sub-chapters with each of them concentrated on one particular stage of the appointment process, namely, nomination, evaluation of candidates and appointment. The Chapter Four is dedicated to evaluation of outcomes obtained in previous chapters.

⁸ On the notion of the "counter-majoritarian" difficulty see, Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-17.

CHAPTER I. THE COUNTER-MAJORITARIAN DIFFICULTY

This chapter provides the basic theoretical background for the thesis by showing importance and problematic character of constitutional court appointments. It mainly refers to the notion of the “counter-majoritarian difficulty,”⁹ the term coined by Alexander Bickel in his work “The Least Dangerous Branch: The Supreme Court at the Bar of Politics”. The key point is the challenging the democratic legitimacy of constitutional review or “deviant institution”¹⁰ which in his view “enables an unelected judiciary [constitutional court] to override the majoritarian will of the people represented by elected legislatures.”¹¹ The problem still remains a “vital issue”¹² and “the central obsession of modern constitutional scholarship”.¹³ The vast majority of authors have contributed to the academic debate trying to resolve the problem “by identifying a domain in which more-than-minimal judicial review is compatible with democratic theory”¹⁴ or “dis-solve”¹⁵ it by attacking the premises on which it is based.¹⁶

In this part of the thesis the notion of the counter-majoritarian difficulty will be clarified; the links between the problem and constitutional court appointments will be drawn; the factors, making this problem more acute and arguments in favor of constitutional court appointment procedure will be considered.

⁹ Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16. According to his words, “[t]he root difficulty is that judicial review is a counter-majoritarian force in our system”

¹⁰ Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 18.

¹¹ Ilya Somin, “Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the ‘Central Obsession’ of Constitutional Theory,” *Iowa Law Review* 89 (2004): 1290.

¹² Miguel Schor, “Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty,” *Minnesota Journal of International Law* 16 (2007): 68.

¹³ Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy,” *New York University School of Law* 73 (1998): 335.

¹⁴ Mark Tushnet, “Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty,” *Michigan Law Review* 94, no. 2 (1999): 246.

¹⁵ This term was first used in Bruce Ackerman, “Storrs Lectures: Discovering the Constitution,” *Yale Law School* 93 (1984): 1016.

¹⁶ See for example, Ghosh, “Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries,” 327-59, Schor, “Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty,” 61-113, Somin, “Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the ‘Central Obsession’ of Constitutional Theory,” 1287-371.

The problem of the “counter-majoritarian difficulty” was formulated by Alexander Bickel, stating that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people ... not on behalf of the prevailing majority but against it.”¹⁷ On the other hand, Barry Friedman characterized the same as “the problem of reconciling judicial review with popular governance in a democratic society”.¹⁸ At the same time, Sarah Wright Sheive noted that, “constitutional courts lack the democratic legitimacy of selection through competitive elections, their authority is antidemocratic to the extent that courts may overrule legislation passed by popularly-elected parliaments”.¹⁹

From the quotations given above, it can be concluded that constitutional courts, which realize the power of constitutional review are criticized for being non-democratic, because of the way they are formed or, in other words, because of the fact that they are not popularly elected. Therefore, constitutional court appointments, as the main topic of this thesis certainly fall within the scope of the counter-majoritarian criticism as one of the means of constitutional courts formation.

The problematic character of constitutional courts appointments can be illustrated by brief description of the premises upon which the counter-majoritarian problem is based. These premises are as follows:²⁰

¹⁷ Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-17.

¹⁸ Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 335.

¹⁹ Sarah Wright Sheive, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* 26, no. 4 (1995): 1201-33, ([cited 12 March 2011]), available from <http://www.clas.ufl.edu/users/kreppel/pos6933/sheive.pdf>

²⁰ Chosen premises reflect the examination of the following literature: Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 333-433, Terri Peretti, "An Empirical Analysis of Alexander Bickel's the Least Dangerous Branch," in *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*, ed. Kent D. Ward and Cecilia R. Castillo (Albany: State of New York Press, 2005), 126-32.

1. Majoritarianism. The “counter-majoritarian difficulty” implies that “the will of the majority should be sovereign in a democracy”.²¹ According to the majoritarian view of democracy, the “democracy is the right of majority to rule”²² and the majority shall decide on the most important political issues.²³ In the meantime, according to Eric Ghosh, “underlying the [counter-majoritarian] concern is a belief that some values promoted by electoral democracy are significantly compromised by judicial review”.²⁴ However, there is no consensus among the authors on whether majoritarianism is a primary feature of democracy or not.²⁵ There is an argument that there are other values of democracy, which can also be undermined by constitutional review, even if the will of the majority, as such, is not undermined, for example, “coherence, polarization and accountability.”²⁶

2. Representation of the “majority will” by elected officials. It is assumed that legislative and executive authorities, elected by people are “more likely to reflect public sentiment.”²⁷ Elected officials presumably represent “popular will”²⁸ or “the will of electoral majorities,”²⁹ as “the latter possess sufficient political knowledge to control what their

²¹Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 354.

²² Stephen Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," *Boston Law Review* 90, no. 2 (2010): 1030.

²³ Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1031.

²⁴Ghosh, "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries," 330.

²⁵ For different views on democracy see, Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1993) 3-34, John Ferejohn and Pasquale Pasquino, "The Countermajoritarian Opportunity" (paper presented at the Rational Choice and Constitutional Law, University of Chicago Law School, 2010), ([cited 16 march 2011]), available from <http://www.law.uchicago.edu/files/file/Ferejohn.pdf>, Ghosh, "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries," 336, Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1029-42.

²⁶ Mark A. Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," *Annual Review of Law & Social Science* 4 (2008): 380.

²⁷ Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 362.

²⁸Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 344.

²⁹ Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the 'Central Obsession' of Constitutional Theory," 1290.

representatives do”.³⁰ In this case free and fair elections form the basis of lawmaking powers legitimacy given to legislative and executive authorities.³¹ This raises the following concerns:

- Whose will is counted as a majority will?
- Do elected bodies always represent it?

As to the first concern, it can be said that there are different views of the notion of majority will and its relevance within the context of the “counter-majoritarian difficulty”.³² For example, as suggested by Barry Friedman the majority is a “group substantial enough that it does not see itself as a distinct minority.”³³ With regard to the second concern, it can be said that sometimes, the will of elected people substitutes the will of the people they are supposed to represent. It may happen that elected representatives act contrary to prevailing public opinion either for the sake of pursuing their own interests or under the influence of various pressure groups.³⁴

In this respect several authors³⁵ raise the issue of “factions”, the term discussed in Federalist no.10, which means the group of the people united by common interests “adversed to the rights of other citizens, or to the permanent and aggregate interests of the community”.

³⁶ In this regard, the constitutional review can be considered as a tool of protecting democracy “from political elites who have failed to gain broad and deep popular support for their innovations” as put by Bruce Ackerman.³⁷ Considering all written above it can be said that

³⁰ Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the 'Central Obsession' of Constitutional Theory," 1290.

³¹ Ackerman, *We the People: Foundations* 8.

³² For the discussion on the notion of “the majority will” see, Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91 (1993): 629-44, Terri Peretti, in *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty and Contemporary Constitutional Theory* (Albany: State University of New York Press, 2005), 125-30.

³³ Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 342.

³⁴ Ferejohn and Pasquino, "The Countermajoritarian Opportunity", ([cited 16 March 2011]); available from <http://www.law.uchicago.edu/files/file/Ferejohn.pdf>.

³⁵ See, Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 67. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-17.

³⁶ *The Federalist No. 10*, ([cited 15 March 2011]); available from <http://www.constitution.org/fed/federa10.htm>.

³⁷ Ackerman, *We the People: Foundations* 10.

legislation passed by elected representatives not always reflects opinions prevailing in the community.³⁸

3. Realization by constitutional courts the power of constitutional review contrary to the majority will. This statement can be divided into two separate concerns: the relationship between constitutional courts and popular opinion (majority will) and the relationship between constitutional courts and elected representatives (this will be discussed in more details in chapter two).

As to the first concern, it can be said that there is a vast majority of sources indicating that it is flawed to assume that constitutional courts always act contrary to the popular will.³⁹

Several observations could be made in relation to the second concern. Some authors trying to “dissolve” (diminish) the counter-majoritarian difficulty indicate that there is no tension between popularly elected bodies and constitutional courts. They indicate that elected bodies support the institute of constitutional review and authorize courts to decide on hot public issues for various political reasons. One of such reasons is the wish to avoid accountability for own decisions with another reason of having the court as an “arbiter”.⁴⁰ As stated by Miguel Schor, the “constitutional courts act as a referee that polices the mechanisms of democracy.”⁴¹ In this regard constitutional courts can be considered as helping “to achieve compromises.”⁴²

This, in turn, raises another concern: “politicization” of constitutional courts. Andras Sajo names “politicization” as the “most frequently cited [argument] against constitutional

³⁸ Peretti, "An Empirical Analysis of Alexander Bickel's the Least Dangerous Branch," 127.

³⁹ Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 362. Peretti, "An Empirical Analysis of Alexander Bickel's the Least Dangerous Branch," 130-33.

⁴⁰ Mark A. Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power," *Maryland Law Review* 65, no. 1 (2006): 5-6. Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 73. Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 380.

⁴¹ Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 73.

⁴² Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power," 5.

adjudication.”⁴³ He states that not popularly elected and unaccountable judges “may go as far as writing laws and constitutions, which is irreconcilable with the function of the judiciary.”⁴⁴ Mark Graber notes that, “the judicial power to declare laws unconstitutional often privileges some members of the present lawmaking majority at the expense of others”.⁴⁵ He also criticizes politicized constitutional review, which formally does not go against the will of the elected bodies, but “may undermine policy decisions made elsewhere in the political system, antagonize crucial voting blocs, and obscure responsibility for policymaking.”⁴⁶

It can be concluded from all stated above that the “counter-majoritarian difficulty” raises a number of concerns for which there are no precise answers. Anyway, there are two fundamental problems present in all discussions on the subject of “counter-majoritarian difficulty”. These are the problem of democratic legitimacy of constitutional review and the problem of politicization of constitutional review. The same problems are very closely connected to the issue of constitutional court appointment mechanisms, because the issue of democratic legitimacy and politicization directly relate to the issue of how constitutional court appointments are made. As stated by Eric Ghosh, “democratizing adjudication is sometimes understood in terms of making judges more representative of the community and accountable to it.”⁴⁷ Christine Landfried also argued that selection of judges plays role in the maintaining the legitimacy of the court.⁴⁸ She maintained that “constitutional review will only be regarded as legitimate in the long run if the principles of transparency, difference, and indirect democratic accountability govern the selection process of judges.”⁴⁹

⁴³ Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest-New-York: Central European University Press, 1999) 236.

⁴⁴ Sajó, *Limiting Government: An Introduction to Constitutionalism* 236.

⁴⁵ Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 364.

⁴⁶ Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 380.

⁴⁷ Ghosh, "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries," 328.

⁴⁸ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 198.

⁴⁹ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 197.

Within any particular jurisdiction there are a number of factors determining to what extent the counter-majoritarian difficulty is more acute.⁵⁰ The factors of “judicial supremacy”⁵¹ and the scope of jurisdiction⁵² can be mentioned as most important ones.

The first factor of “judicial supremacy” means that decisions of the court are binding and cannot be overridden.⁵³ Bickel insisted that the democratic character of legislative branch is determined by the fact that “a representative majority has the power to accomplish a reversal”⁵⁴, in other words, to overturn an already made decision. Further, he contrasts constitutional review with legislation, stating that constitutional review as opposed to legislation cannot be changed by “legislative majority” and therefore is undemocratic.⁵⁵

The second factor making the counter-majoritarian difficulty more acute is the scope of the jurisdiction.⁵⁶ The more courts interfere with legislative process, the more questions arise. This factor combined with the previous one also contributes to the expansion of the courts power. This statement will be further considered in this thesis in relation to jurisdictions of the United States, Canada and Germany.

As stated previously, the counter-majoritarian difficulty questions the legitimacy of constitutional review because it is practiced by non-elected judges. One of the questions, which could be potentially asked in relation to that, is why constitutional court judges are not popularly elected. The answer can be found in Federalist Papers, as one of the best sources of legal theory. Justification of the appointment process as opposed to popular elections of the judiciary (constitutional courts) is given in Federalist Paper no. 51. Although the arguments presented in the work mostly relate to the judiciary of the USA, they are relevant in relation

⁵⁰ *For the four factors provided by Barry Friedman see, Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy,"* 342.

⁵¹ Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," 333.

⁵² *Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty*, (2005 [cited 14 March 2011]); available from <http://legaltheorylexicon.blogspot.com/2005/06/legal-theory-lexicon-047-counter.html>.

⁵³ *Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty*, ([cited]).

⁵⁴ Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 17.

⁵⁵ Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 17.

⁵⁶ *Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty*, ([cited]).

to other jurisdictions. James Madison, the author of the paper, starts the discussion on the formation of the court with consideration of separation of powers principle, stating that each branch of power “should have a will of its own ... [and] members of each [department] should have as little agency as possible in the appointment of the members of the others.”⁵⁷ He argues that the principle requires each branch to be formed directly by the people, but it is permitted to depart from it, due to the potential difficulties which could be faced.⁵⁸

In particular, he points out that it would be inappropriate to stick to this principle in relation to the judiciary because of two factors: The first factor, justifying the appointment process, is the need for “qualifications”, which are “essential in the [court] members.”⁵⁹ He states that in this respect the primary goal is to find the form of selection which would “secure these qualifications”.⁶⁰ This statement justifies the appointment procedure and shows the importance of considering professional qualifications in the process of court formation. Indeed, professionalism is one of the aims of constitutional court appointments. Indeed, professionalism is one of the aims of constitutional court appointments. Hamilton in Federalist no. 78 said that “there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.”⁶¹ “Politicization”, which is one of the potential problems faced by the court, starts from the appointment process, where political considerations prevail over merits of the candidates.⁶²

The second factor mentioned by Madison is the permanent tenure served by judges, which in Madison’s words, “must soon destroy all sense of dependence on the authority conferring them”.⁶³ Permanent tenure is one of the means of making non-elected courts more

⁵⁷ *The Federalist No. 51*, ([cited 15 March 2011]); available from <http://www.constitution.org/fed/federa51.htm>.

⁵⁸ *The Federalist No. 51*, ([cited]).

⁵⁹ *The Federalist No. 51*, ([cited]).

⁶⁰ *The Federalist No. 51*, ([cited]).

⁶¹ *The Federalist No. 78*, ([cited 20 March 2011]); available from <http://www.constitution.org/fed/federa78.htm>.

⁶² Renata Uitz, *Judicial Independence: Fundamentals Revisited through International Instruments and Constitutional Jurisprudence* (2008 [cited 20 March 2011]); available from http://www.lprc.kz/en/index.php?option=com_content&task=view&id=82.

⁶³ *The Federalist No. 51*, ([cited]).

independent, because it preserves court judges from “forced retirement and resignation”.⁶⁴ Hamilton named permanent tenure “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”⁶⁵

The “counter-majoritarian difficulty”, considered in this chapter as the debatable matter, questions the legitimacy of constitutional review on the premise that it is implemented by courts not elected popularly and runs contrary to the will of the majority. By examining the counter-majoritarian difficulty notion a background for further study in this thesis was made.

The issue of constitutional court appointments was identified as the issue directly connected to the counter-majoritarian difficulty. The legitimacy of constitutional courts and independence of constitutional courts have been identified as main objective of constitutional court appointment process.

By showing that the importance of the counter-majoritarian difficulty in particular jurisdiction is determined by the level of the judicial “supremacy” and the scope of the jurisdiction, the acuteness of this problem was underlined.

By presenting the arguments given by Madison in Federalist no. 51 in favor of the appointment procedure an answer to the question of not popularly elected constitutional courts was highlighted and importance of constitutional court appointment process was underlined in light of ensuring professionalism of judges and independence of court.

⁶⁴ Uitz, *Judicial Independence: Fundamentals Revisited through International Instruments and Constitutional Jurisprudence* ([cited]).

⁶⁵ *The Federalist No. 78*, ([cited]).

CHAPTER II. INSTITUTIONAL FRAMEWORK

This chapter provides background for the thesis by outlining the general elements of the relationship between the constitutional courts as “guardians of constitution”⁶⁶ and parliaments as elected representatives of the majority will. The aim of the chapter is to highlight the context of constitutional court appointment process. Subchapter One concentrates on constitutional court powers and briefly analyses how constitutional courts interfere with the law-making process. It also describes other powers of constitutional courts in relation to parliaments. Subchapter Two shows how parliaments interfere with constitutional courts.

2.1 Interference of Constitutional Courts with Parliaments

2.1.1 Constitutional review

The lawmaking is the major field of relationship between constitutional courts and parliaments.⁶⁷ Considered to be the “guardians of constitution” of constitution, constitutional courts closely interact with parliaments by realizing the power of constitutional review to check statutes passed by parliaments on the matter of their compliance with constitution.

According to Ginsburg and Sweet, constitutional courts play role in “judicial law-making”⁶⁸ or “constitutional decision-making”⁶⁹. Constitutional courts are deemed to be regularly intervening with law-making process by “establishing limits on law-making behaviour, reconfiguring policy-making environments, even drafting the precise terms of legislation.”⁷⁰ Mark Graber also states that “constitutional courts are intruding into more and

⁶⁶ *The Federalist No. 78*, ([cited]).

⁶⁷ See Tom Ginsburg, “Ancillary Powers of Constitutional Courts,” in *Institutions and Public Law: Comparative Perspectives*, ed. Tom Ginsburg and Robert A. Kagan (New York: Peter Lang Publishing, 2004), 226, Alec Stone Sweet, “Constitutional Courts and Parliamentary Democracy,” *West European Politics* 25: 93.

⁶⁸ Ginsburg, “Ancillary Powers of Constitutional Courts,” 226.

⁶⁹ Sweet, “Constitutional Courts and Parliamentary Democracy,” 93.

⁷⁰ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) 1.

more areas traditionally reserved for other political decision-makers.”⁷¹ As seen from quotations given above there are a number of authors inclined to see interaction between constitutional courts and parliaments more than interference rather than cooperation.

There are two models of constitutional review: European or “centralized” and American or “decentralized”.⁷² European model gives the power of constitutional review to one single body, which is not the part of the judiciary, whereas American gives the power of constitutional review to all courts as parts of the judiciary.⁷³

Let us consider related institutional frameworks of constitutional review of Canada, USA and Germany as examples of “centralized” and “decentralized” models.

The United States of America has a “decentralized” model of constitutional review.⁷⁴ The U.S. Supreme Court was founded pursuant to Article III, Section 1 of the U.S. Constitution, which provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish”⁷⁵ and the Judiciary Act of 1789.⁷⁶ The Court has an appellate jurisdiction over the cases, enumerated in the Article III, Section 2 of the U.S. Constitution. Moreover, it has a limited “original jurisdiction”⁷⁷ over the cases “affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party.”⁷⁸ The Court’s power to examine the constitutionality of statutes originated as a result of the *Marbury v. Madison*, in which Justice Marshall stated that “it is emphatically the province and duty of the judicial department to say

⁷¹ Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power," 4.

⁷² Louis Favoreu, "Constitutional Review in Europe, in Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin and Albert J. Rosenthal Eds., 1990)," in *Comparative Constitutionalism: Cases and Materials*, ed. Norman Dorsen, et al. (Minnesota: West Group, 2003), 114.

⁷³ Favoreu, "Constitutional Review in Europe, in Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin and Albert J. Rosenthal Eds., 1990)," 114.

⁷⁴ Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 20.

⁷⁵ Constitution of the United States of America, (1787), Article III, Section 1.

⁷⁶ *A Brief Overview of the Supreme Court*, ([cited 20 March 2011]); available from <http://www.supremecourt.gov/about/briefoverview.aspx>.

⁷⁷ *The Court and Constitutional Interpretation*, ([cited 20 March 2011]); available from <http://www.supremecourt.gov/about/constitutional.aspx>.

⁷⁸ Constitution of the United States of America, (1787), Article III, Section 2

what the law is.”⁷⁹ The Supreme Court of the USA is authorized to challenge the constitutionality of statutes in connection with real “case and controversy”.⁸⁰ Therefore the court has a power of concrete review.⁸¹

Taking Canada as an example, it can be said that Supreme Court of Canada represents “decentralized” model of constitutional review, being at the same time the court of the last appellate jurisdiction.⁸² The Court deals with constitutional matters in regular litigation (concrete review)⁸³ or if they are raised by the Governor-in-Council pursuant to section 53 of the Supreme Court Act (“reference” jurisdiction).⁸⁴

German Federal Constitutional Court (Bundesverfassungsgericht or BverfG) is the “supreme guardian of the constitution”⁸⁵ and the “principal body of constitutional jurisdiction”⁸⁶, established by the German Basic Law (Grundgesetz)⁸⁷ in 1949. The Court represents “centralized” model of constitutional review⁸⁸ being the “specialized tribunal” with the exclusive power to decide on constitutional issues.⁸⁹ Gotthard Wöhrmann compared the German Constitutional Court to the court of the “first and final instance.”⁹⁰ It has been argued that the adoption of this type of constitutional review was predetermined by the structure of the court system and legal traditions of Germany.⁹¹ The legal status of the Court is regulated by the Basic Law⁹² and the Federal Constitutional Court Act⁹³.

⁷⁹ *The Court and Constitutional Interpretation*, ([cited]).

⁸⁰ *The Court and Constitutional Interpretation*, ([cited]).

⁸¹ Concrete review is a power to decide on the constitutionality of laws only in relation with a particular case. See, Favoreu, “Constitutional Review in Europe, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin and Albert J. Rosenthal Eds., 1990),” 114.

⁸² Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 20.

⁸³ Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 20.

⁸⁴ Canada Supreme Court Act, 1985, Article 53

⁸⁵ Gotthard Wöhrmann, *The Federal Constitutional Court: An Introduction* (InterNations, 1996 [cited 20 March 2011]); available from <http://www.iuscomp.org/gla/literature/Inbverfg.htm>.

⁸⁶ Wolfgang Zeidler, “The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms,” in *Notre Dame Law Review* (1987), 504.

⁸⁷ Basic Law for the Republic of Germany (1949), Article 93.

⁸⁸ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2 ed. (Durham: Duke University Press, 1997) 3.

⁸⁹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 3.

⁹⁰ Wöhrmann, *The Federal Constitutional Court: An Introduction* ([cited]).

⁹¹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 3-4.

⁹² See Basic Law for the Federal Republic of Germany, Articles 92-94, 99, 100, 15 (g) and (h)

⁹³ Federal Constitutional Court Act, (1951).

Throughout its functioning the German Constitutional Court “has developed an extensive constitutional jurisprudence of considerable subtlety and power.”⁹⁴ The Court is not considered as a part of the judiciary and as the court of the appellate jurisdiction.⁹⁵ The Court is considered as one of the most influential courts and as a counterpart of the Supreme Court of the USA in protecting democracy.⁹⁶

The Court has a broad jurisdiction, explicitly prescribed by the Basic Law.⁹⁷ The Court practices the powers of abstract (the power to challenge the constitutionality of the statute in the absence of the real case) and concrete (the power to challenge the constitutionality of the statute only in connection with the real case) review, individual constitutional complaint procedure (initiated by individuals claiming the violation of the basic rights).⁹⁸ The judgments of the Court cannot be appealed, i.e. they are final.⁹⁹ Moreover, they have binding effect not only on the parties of the dispute, but everyone, including state actors and individuals.¹⁰⁰

Direct control involves explicit nullification of the statute. By nullifying provisions incompatible with Constitution, constitutional court acts as a “negative legislator”.¹⁰¹ Tom Ginsburg points out that, while realizing the power of constitutional review the Court primarily deals with two fields: disputes between lawmaking actors and human rights protection.¹⁰²

⁹⁴ Peter E. Quint, "Leading a Constitutional Court: Perspectives from the Federal Republic of Germany," in *University of Pennsylvania Law Review* (2006), 1854.

⁹⁵ Wöhrmann, *The Federal Constitutional Court: An Introduction* ([cited]).

⁹⁶ Kommers, "The Federal Constitutional Court: Guardian of German Democracy," 111.

⁹⁷ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 10.

⁹⁸ For the full list of the Court's powers see Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 10. Alfred Rinken, "The Federal Constitutional Court and the German Political System," in *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Constitutional Court*, ed. Ralf Rogowski and Thomas Gawron (New York: Berghahn Books, 2002), 62, Wöhrmann, *The Federal Constitutional Court: An Introduction* ([cited]).

⁹⁹ Rinken, "The Federal Constitutional Court and the German Political System," 71.

¹⁰⁰ Rinken, "The Federal Constitutional Court and the German Political System," 71.

¹⁰¹ Sweet, "Constitutional Courts and Parliamentary Democracy," 93.

¹⁰² Ginsburg, "Ancillary Powers of Constitutional Courts," 226.

In relation to the first point, it could be said that the courts are acting as a “neutral third party.”¹⁰³ Regarding the second point, It could be shown that human right protection sphere in constitutional review increases the role of constitutional courts and erodes the boundaries between the “negative legislation” realized by the court and the “positive legislation” initially possessed by legislatures. It has been argued that “the constitutional judge is inevitably and on a permanent basis close to the powers of the legislator in a “positive” sense as well.”¹⁰⁴ In fact, the courts act more as policy-makers rather than neutral third parties in the sphere of human right protection.¹⁰⁵ This view is supported by the examples of German Federal Constitutional Court, which “uses notions and concepts not found in the Basic Law”¹⁰⁶ and Supreme Court of the United States, which infers the right of privacy from the U.S. Constitution, when this right is not explicitly provided by the Constitution¹⁰⁷. These are clear examples of courts acting as effective policy-makers.

There are two ways in which constitutional courts assert indirect control on parliaments in two ways: “autolimitation” and “corrective revision”.¹⁰⁸ According to Alec Stone Sweet, “autolimitation” is the process by which parliaments annul or change the laws, which they expect to be rejected or corrected by the Court.¹⁰⁹ To that end Christine Landfried argued that by annulling or changing the legislation in anticipation of constitutional review politicians “reduce the range of possible solutions to political and social problems.”¹¹⁰

As for the “corrective revision”¹¹¹ this type of control enables correction by parliament of the statutes negatively reviewed by constitutional court in order of bringing

¹⁰³ Ginsburg, "Ancillary Powers of Constitutional Courts," 226.

¹⁰⁴ Christoph Grabenwarter, "Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies" (paper presented at the 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 2011), ([cited 20 March]); available from http://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech_thesis.pdf.

¹⁰⁵ *Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty*, ([cited]).

¹⁰⁶ Sajó, *Limiting Government: An Introduction to Constitutionalism* 239.

¹⁰⁷ Sajó, *Limiting Government: An Introduction to Constitutionalism* 239.

¹⁰⁸ Sweet, "Constitutional Courts and Parliamentary Democracy," 94.

¹⁰⁹ Sweet, "Constitutional Courts and Parliamentary Democracy," 94.

¹¹⁰ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 199.

¹¹¹ Sweet, "Constitutional Courts and Parliamentary Democracy," 94.

them in conformity with the constitutional review. However, Stone Sweet points out that at this stage, legislators may avoid constitutional revision by “forego[ing] the whole act”¹¹²; reformulating the statute and interpreting it in a narrow manner or amending the constitution.¹¹³ This type of reaction of parliaments to the power of constitutional review can be referred to means by which parliaments interfere with constitutional courts. This will be analyzed in the next sub-chapter.

2.1.2 Ancillary powers of Constitutional Courts

The second sphere of interrelations follows from the powers other than constitutional review or “ancillary powers”¹¹⁴, as called by Tom Ginsburg. These powers constitute supplementary devices by means of which courts can hold the parliaments accountable.¹¹⁵ Initiation of legislation, supervision of elections, decision as to the constitutionality of political parties, participation in the impeachment procedure are among “ancillary” powers of the court.¹¹⁶ As an example, the German Constitutional Court, has certain instruments for separation of powers, such as dispute resolution between organs of state (Organstreit), prohibition of political parties, impeachment procedures, “scrutiny of election”, etc.¹¹⁷

2.2 Interference of Parliaments with Constitutional Courts

In this part of the thesis the means by which parliaments can potentially influence Constitutional Courts will be briefly outlined.

¹¹² Ginsburg, "Ancillary Powers of Constitutional Courts," 94.

¹¹³ Sweet, "Constitutional Courts and Parliamentary Democracy," 94-95.

¹¹⁴ Ginsburg, "Ancillary Powers of Constitutional Courts," 225.

¹¹⁵ Ginsburg, "Ancillary Powers of Constitutional Courts," 230.

¹¹⁶ Ginsburg, "Ancillary Powers of Constitutional Courts," 230.

¹¹⁷ For the full list of the Court's powers see Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 10. Rinken, "The Federal Constitutional Court and the German Political System," 62, Wöhrmann, *The Federal Constitutional Court: An Introduction* ([cited]).

As the example of positive influence of parliaments, Mark Graber states “justices gain and increase their power to declare laws unconstitutional and make public policy when and only when at least some members of the existing governing coalition wish justices to exercise such power.”¹¹⁸ This statement implies that the scope of power of constitutional courts and its expansion is the result of the parliamentary involvement (as well as the members of the executive branch). Among the means inclined towards the increasing the role of the court indicates those, such as expanding of jurisdiction, appointing activist judges, widening the access to court, “adopting vague statutory language”, which will help then to interpret it by court and to shape its meaning and others.¹¹⁹ Miguel Schor indicates two possible “means of democratizing” the constitutional review: ex-ante and post facto means.¹²⁰ Among ex-ante controls he indicates the power of appointments, among post-facto the power “for a democratic override of constitutional interpretation.”¹²¹ The latter means the power of parliaments to override decisions made by constitutional courts.¹²²

Among other critical powers of parliaments there are such powers, like participation in establishing and organization of the court (appointments, tenure, the courts structure and jurisdiction), the power to allocate the courts budgets and the role of parliaments in applying disciplinary measures to the judges, up to impeachment procedure.¹²³

This chapter shows the means by which parliaments and courts influence and interfere with each other. Each of the bodies may serve as a check on the other. For example, constitutional courts may strike down statutes passed by the legislature, alleviate the meaning of the law, use other or “ancillary” powers. Parliaments, in their turn, may change the court’s

¹¹⁸ Mark A. Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power," *Md. L. Rev.* 65, no. 1 (2006): 7.

¹¹⁹ Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," 364.

¹²⁰ Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 70.

¹²¹ Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 70.

¹²² Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 70.

¹²³ Uitz, *Judicial Independence: Fundamentals Revisited through International Instruments and Constitutional Jurisprudence* (cited).

jurisdiction, set the court's budget and overturn court decisions. As seen from the written above the relationship between parliaments and courts may be fluid in light of the powers of the court and power of parliaments. For this reason, striking the balance for these relationships is of vital importance to secure the smooth functioning of these two institutions which form inseparable parts of the state governance system. In this regard, the constitutional court appointment process gains special importance as one aimed at finding such balance.

CHAPTER III. CONSTITUTIONAL COURT APPOINTMENT PROCESS: USA, CANADA, GERMANY

The interrelations between parliaments elected by people and not popularly-elected courts responsible for realizing the process of constitutional review have been examined in previous two chapters. As seen from the review conducted in these chapters, some problems and contradictions exist in those relationships with the “counter-majoritarian” difficulty being one of them. The wider participation of parliaments in appointments to the courts realizing constitutional review was identified as one of the ways helping to overcome the problems such as the “counter-majoritarian” difficulty. In this chapter the process of constitutional court appointments in three jurisdictions USA, Canada and Germany will be examined with aim of finding to what extent the respective parliaments have their voice in this process.

In practice there are three main stages generic to the appointment processes of virtually any nature. These are nomination of candidates suitable for the appointment in question; evaluation of candidates by a body specifically formed or assigned for this purpose and the appointment or approval of successful candidates as the final stage of the whole process.

As for the constitutional court appointments, the major assumption here is that the wider involvement of respective parliamentary bodies at each of the stages outlined above secures more democratic and representative composition of constitutional courts, which in turn, helps in overcoming the problems described in previous chapters, including the “counter-majoritarian” difficulty.

As the models for review of the constitutional court appointment processes the jurisdictions of USA, Canada and Germany have been chosen as ones employing the constitutional court appointment and constitutional review processes differing from each

other to the considerable extent. Thus, the United States Supreme Court appointment process involves the participation of both the executive and the legislative branch.¹²⁴ In the meantime, the jurisdiction of Canada is known for having much more limited and less formalized parliamentary involvement into the process compared to the United States.¹²⁵ It should be noted here that there are a number of reforms ongoing in Canada with aim of broadening inclusion of parliament in this process.¹²⁶ As for Germany, this jurisdiction represents certain interest as a model for this review for having its constitutional court appointment process mostly as a prerogative of legislative power rather than executive one.¹²⁷ In addition to that, the German Constitutional Court is not considered as a part of the judiciary in contrast to the Supreme Courts of the United States and Canada, which makes this jurisdiction rather special compared to other two jurisdictions.¹²⁸ Another interesting point in selection of these three jurisdictions as models is the fact that USA represents an example of presidential system of government, while Germany and Canada are parliamentary countries with Canada having Queen of England as nominal head of state.

The proposed review of the constitutional court appointment process in the jurisdictions selected for this purpose will be carried out on the basis of each of three appointment process stages outlined above in this text.

¹²⁴ Lee Epstein, "Comparing Judicial Selection Systems," 16.

¹²⁵ Gee, "The Politics of Judicial Appointments in Canada," 108-13.

¹²⁶ Gee, "The Politics of Judicial Appointments in Canada," 108-13.

¹²⁷ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 196-208.

¹²⁸ Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 20, Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 3.

3.1 Nomination of Candidates

In the United States “the appointment of a Supreme Court Justice is an event of major significance in American politics.”¹²⁹ The Supreme Court, realizing the power of constitutional review consists of nine judges¹³⁰ or Justices serving the life tenure.¹³¹

Due to the life tenure of the Supreme Court Justices the need for replacement arises only in cases of “death, retirement, or resignation of a Justice (or when a Justice announces the intention to retire or resign).”¹³²

The process of Supreme Court appointments is described in Article II, section 2 of the U.S. Constitution, according to which, the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court.”¹³³ Therefore, the process involves the nomination by the President and the confirmation by the Senate.

In order to nominate the judge of the Supreme Court, the President takes part in “the background investigation and initial evaluation of prospective nominees”.¹³⁴ The President consults with “the Federal Bureau of Investigation (FBI), officials from Justice Department, and aides from the White House.”¹³⁵ As the Senate has the formal power to advise the President on his selection of candidates, the President may also consult with the Senate on this matter although this practice is not followed strictly at present.¹³⁶

¹²⁹ Denis Steven Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," (2010).

¹³⁰ Malvina Halberstam, "Judicial Review, a Comparative Perspective: Israel, Canada and the United States," *Cardozo Law Review* 32, no. 6 (2010): 2395.

¹³¹ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 1.

¹³² Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 6.

¹³³ The Constitution of the United States of America (1789) Article II, Section 2

¹³⁴ Leslie Flores, *Lessons from Us Supreme Court Appointments: A Quick Look at Justice Sotomayor's Experience* (2009 [cited 25 March 2011]); available from http://www.tan.org.ph/index.php?option=com_content&view=article&id=77:lessons-from-us-supreme-court-appointments-a-quick-look-at-justice-sotomayors-experience-&catid=50:supreme-court-appointments-watch&Itemid=89.

¹³⁵ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 11-13.

¹³⁶ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 6-7.

There are no special requirements in Constitution of professional qualifications, age and admission of candidates to the judicial practice.¹³⁷

In the meantime, in Canada the importance of constitutional court appointments issue has been gaining more momentum over the recent years in connection with the changes taking place in judicial and parliamentary systems of this country.¹³⁸ The case is that Supreme Court of Canada (SCC) founded in 1875 has evolved into an influential body shaping the country's policy in different spheres of life.¹³⁹ Initially, the Court was not considered as the court of the last resort and its judgments could be potentially appealed to the British Judiciary Committee for the Privy Council.¹⁴⁰ The issue of the Court appointments procedure, therefore, was not a topic of debate due to the Courts non-influential position. The transformation started with the complete abolition of the Judiciary Committee's appellate jurisdiction, making the Supreme Court the highest appellate court in the Canadian judicial system.¹⁴¹ The second crucial fact, which broadened the jurisdiction of the court and made it more influential, is the adoption of the Charter of Fundamental Rights in 1982.¹⁴² Since that time the courts' role as an important actor, has increased enormously, leading to the criticisms of the courts' jurisprudence and triggering the hot debate over the appointments procedure. Nowadays, the appointment process can be characterized as "a system in transition."¹⁴³ It has been argued that, "Canada now has an American-style Supreme Court with an unreformed British style appointment system"¹⁴⁴, vesting the power of appointment

¹³⁷ Jack K. Knight Lee Epstein, Olga Shvetsova, "Comparing Judicial Selection Systems," *William and Mary Bill of Rights Journal* 10, no. 7 (2001): 17.

¹³⁸ F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Peter H. Russell Kate Malleson (Toronto, Buffalo, London: University of Toronto Press, 2006), 70-77.

¹³⁹ Gee, "The Politics of Judicial Appointments in Canada," 109.

¹⁴⁰ Sujit Choudhry, "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?," *Democracy and Federalism Series* 7 (2005): 3.

¹⁴¹ Choudhry, "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?," 3.

¹⁴² Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 109.

¹⁴³ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 56.

¹⁴⁴ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 57.

solely within the executive. The debate over the appointment process comprises the set of antagonist interests, including the interests of liberals (praising the transformation of the court) and conservatives (criticizing the court for being activist), provinces (willing to assert their control over the process) and federal level (inclined towards centralism).¹⁴⁵ Authors indicate concerns regarding the relation between the mostly unchanged process of the appointments and the increasing transformation of the Court.¹⁴⁶

The Supreme Court of Canada consists of nine judges.¹⁴⁷ According to Section 5 of Supreme Court Act, “any person may be appointed a judge 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”.¹⁴⁸ Three of them have to represent Quebec.¹⁴⁹ From one side this requirement has practical meaning, taking into account the appellate jurisdiction of the Supreme Court over the Quebec, representing civil legal system as opposed to the common law system of the rest of the Canada. On the other hand, this fact represents “French-English dualism of Canadian political system”.¹⁵⁰ Moreover, according to the “convention of legal representation”, one judge out of nine represents Atlantic region and two are coming from western provinces¹⁵¹, namely British Columbia, Alberta, Saskatchewan or Manitoba.¹⁵² Authors indicate the convention of representation of women substantiating the statement with the examples from the Court.¹⁵³

¹⁴⁵ Choudhry, "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?," 3, Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 70-77.

¹⁴⁶ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 57.

¹⁴⁷ Supreme Court Act of Canada (1985), Section 4

¹⁴⁸ Supreme Court Act of Canada (1985), Section 5

¹⁴⁹ Supreme Court Act of Canada (1985), Section 6

¹⁵⁰ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 58.

¹⁵¹ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 58.

¹⁵² Gee, "The Politics of Judicial Appointments in Canada," 112.

¹⁵³ Gee, "The Politics of Judicial Appointments in Canada," 112-13.

At this stage the nomination is the prerogative of the executive power only represented by the Minister of Justice.¹⁵⁴ He is usually free in making his selections and may consult with:

the Chief Justice of Canada, ... other members of the Supreme Court of Canada, the Chief Justices of the courts of the relevant region, the Attorneys General of the relevant region; at least one senior member of the Canadian Bar Association; at least one senior member of the Law Society of the relevant region.¹⁵⁵

Judges of the Supreme Court of Canada serve “during good behaviour”¹⁵⁶ with a retirement age of 75¹⁵⁷, unlike the United States where the retirement age is not specified.

As seen from the above, there are a number of similarities in nomination of candidates in the United States and Canada in terms of vesting this stage purely with the executive power.

Germany, as a European country, has the appointment process, which is different in many respects from that one employed in two North American countries considered above in this review. According to Article 94 of the German Basic Law, the Constitutional Court consists of sixteen members sitting in two Senates of the Court. For this reason, the Court is characterized as a “twin court.”¹⁵⁸ Both Senates act on behalf of the Court as a whole.¹⁵⁹ Senates are united in the body, called Plenum, which “is supposed to ensure consistency of decisions”¹⁶⁰ playing the role in resolution of conflicts between two senates.¹⁶¹ In addition to that, the Plenum is also responsible for managing administrative matters of the Court.¹⁶²

In order to qualify for a position of a German Constitutional Court judge, persons must be at least forty years old and have a passive voting right for a Bundestag.¹⁶³ Moreover,

¹⁵⁴ Gee, "The Politics of Judicial Appointments in Canada," 108.

¹⁵⁵ *Proposal to Reform the Supreme Court of Canada Appointments Process*, (2005 [cited 25 March 2011]); available from <http://www.justice.gc.ca/eng/dept-min/pub/scc-csc/2.html>.

¹⁵⁶ Constitution Act (1867), Section 99 (1).

¹⁵⁷ Constitution Act (1867), Section 99 (2).

¹⁵⁸ Rinken, "The Federal Constitutional Court and the German Political System," 72.

¹⁵⁹ Rinken, "The Federal Constitutional Court and the German Political System," 72.

¹⁶⁰ Rinken, "The Federal Constitutional Court and the German Political System," 72.

¹⁶¹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 16.

¹⁶² Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 16.

¹⁶³ Federal Constitutional Court Act, (1951), Article 3 (1).

they have to meet requirements for the position of a judge under the Judges Act.¹⁶⁴ Pursuant to the named act, degree in law with at least two years of the studies spent in Germany, two years legal practice “at a civil court, the prosecutor’s office or a penal court, with the government, in a lawyer’s office and in an elective position”¹⁶⁵, passage of the second bar examination and German citizenship are among the general requirements.¹⁶⁶ Moreover, the principle of incompatibility of the position of the judge with other elected positions¹⁶⁷ applies, so that person loses its previous position, as soon as elected to the court. The exception is the position of the lecturer of law at German university.¹⁶⁸ This fact demonstrates the respect granted to the scholars within the German Constitutional Court, who constitute its considerable part. It also demonstrates the rigor with which the German legislators approach the matter of constitutional court appointments.

It is important to note, that three members of each Senate “must have worked for at least three years as judges of a Federal High Court.”¹⁶⁹

According to Article 8 (1) of Federal Constitutional Court Act, “[t]he Federal Ministry of Justice shall draw up a list of all Federal judges meeting the requirements.”¹⁷⁰ The Minister also compiles the list of candidates, proposed “by the parliamentary parties, the federal government, or a state government.”¹⁷¹ There is a requirement to maintain all the lists “continually updated”.¹⁷² When the need for election of judges arises these lists must be sent

¹⁶⁴ Federal Constitutional Court Act, (1951) Article 3 (2).

¹⁶⁵ § 5 of Federal Judges Act in Anja Seibert-Fohr, "Constitutional Guarantees of Judicial Independence in Germany," in *Recent Trends in German and European Constitutional Law*, ed. R. Wolfrum E. Riedel (Berlin/Heidelberg/New York: Springer, 2006), 275.

¹⁶⁶ Seibert-Fohr, "Constitutional Guarantees of Judicial Independence in Germany," 275.

¹⁶⁷ Basic Law for the Federal Republic of Germany (1949), Article 94 (1), "Federal Constitutional Court Act," Article 3 (3).

¹⁶⁸ Basic Law for the Federal Republic of Germany (1949), Article 3 (4).

¹⁶⁹ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 200.

¹⁷⁰ Federal Constitutional Court Act, (1951), Article 8 (1).

¹⁷¹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21-22.

¹⁷² Federal Constitutional Court Act, (1951), Article 8 (3).

to the “electoral organs” at least one week prior to the elections.¹⁷³ Typically “the electoral organs” are either Judicial Selection Committee of Bundestag or Bundesrat.¹⁷⁴

Thus, it can be said that the nomination of candidates for the German Constitutional Court formally lies with the Minister of Justice, as the person responsible for maintaining the lists of potential candidates and communicating these lists to electoral bodies at their request. In the meantime, there is a possibility of nominating the candidates by Constitutional Court itself in case of failure to elect new justice by either of the parliamentary houses “within two month of expiration of a sitting justice’s term”, although “parliament is not obligated to choose the appointee from this or any other list”.¹⁷⁵

From the review of the nomination stage it follows that the nomination of the candidates for constitutional courts is the prerogative of the executive power in all three jurisdictions, but differs in details and degree of involvement of parliamentary bodies at this particular stage. If in USA and Canada the parliamentary involvement is limited by consultations held with them by representatives of executive power on nonobligatory basis, in Germany the same may have more formal character amounting to pre-nomination of candidates by participants of political process, including political parties represented in Parliament, although formal nomination still lies with the Minister of Justice through submission of lists of candidates selected on the basis of strict selection criteria prescribed by law.

3.2 Evaluation of Candidates

In the United States, once the nomination is made by the President the candidacy passes over for consideration to Senate Judiciary Committee.¹⁷⁶

¹⁷³ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 22.

¹⁷⁴ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21.

¹⁷⁵ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 22.

¹⁷⁶ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 17.

There are three stages of Senate Judiciary Committee, namely “a pre-hearing investigative stage, public hearings, and the concluding stage.”¹⁷⁷

At the pre-hearing stage the Committee sends its questionnaire to nominee and checks his/her professional background.¹⁷⁸ At the same time, the nominee makes the “courtesy calls” on some Senators in their offices according to tradition,¹⁷⁹ which is not good practice, in fact, as this may impair the nominee’s independence of judgment, if he or she is appointed to the court. Another body, participating at this stage is the American Bar Association’s Standing Committee, whose responsibility is providing its evaluation of the nominee’s professional qualifications and experience to the Senate Judiciary Committee.¹⁸⁰

Next stage of the consideration by the Senate Judiciary Committee is hearing, when the members of the Committee put their questions directly to nominees. The questions put to nominee normally include ones related to his/her professional qualifications while the other ones may be of more general nature mostly aimed at revealing nominee’s broader attitudes and preferences.¹⁸¹ Sometimes judgments made based on the questions of general nature, including judicial philosophy prevail over the judgments inferred from the questions related to professional qualifications. This fact signals of significant shift towards politicization of the process of appointment. The most prominent example of it is the rejection of David Bork’s candidacy purely on the basis of his so-called “judicial philosophy”.¹⁸²

Sometimes nominees “are reluctant to answer certain questions” particularly on the “judicial philosophy”.¹⁸³ The precedent for not answering to questions of that kind was laid

¹⁷⁷ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 21-22.

¹⁷⁸ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 22.

¹⁷⁹ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 24.

¹⁸⁰ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 25.

¹⁸¹ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 29.

¹⁸² Edith H. Jones, "Observations on the Status and Impact of the Judicial Confirmation Process," *University of Richmond Law Review* 39 (2005): 838.

¹⁸³ Robert Post and Reva Siegel, "Questioning Justice: Law and Politics in Judicial Confirmation Hearings," *Yale Law Journal (Pocket Part)* 115 (2006): 38.

down by Sandra Day O'Connor refusing to comment on issues which "may come before the Court."¹⁸⁴

The main objective of hearings by the Judiciary Committee is the provision of Senate with report giving "positive, negative or no recommendation at all".¹⁸⁵ Although the report is not binding for the Senate, nevertheless, negative reports, or reports without recommendation indicate that nominations may face "substantial opposition in the full Senate."¹⁸⁶

The process itself is much more open for public now than it used to be in the past.¹⁸⁷ The nominations to the Supreme Court are announced by President in televised news events.¹⁸⁸ The hearings by the Judiciary Committee, the committee's vote on the nominee, Senate debate, and finally Senate vote on the nomination receive full media coverage and broadcast regularly on TV¹⁸⁹, which, of course, does not represent by itself any kind of protection or warranty against potential abuse and/or political bias in selection and confirmation processes. It should also be noted here that the whole process of Supreme Court appointment in the United States is the prerogative of President and Senate with the House of Representatives completely absent in this process. This can be considered as significant limitation of the Supreme Court appointments process in the United States from the view point of counter-majoritarian difficulty.

In Canada the vacancy, which arose in 2005, lead to the further reforming of this process.¹⁹⁰ Thus, Minister of Justice Irwin Cotler, introduced the four-stage appointment process, further supplemented with one more stage.¹⁹¹ According to this process the Minister

¹⁸⁴ Questioning justice: law and politics in judicial confirmation hearings, "Questioning Justice: Law and Politics in Judicial Confirmation Hearings," (2006): 44.

¹⁸⁵ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 32.

¹⁸⁶ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 35.

¹⁸⁷ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 56.

¹⁸⁸ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 56.

¹⁸⁹ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 56.

¹⁹⁰ Gee, "The Politics of Judicial Appointments in Canada," 109.

¹⁹¹ Gee, "The Politics of Judicial Appointments in Canada," 109.

of Justice forms the list of eight candidates and then sends it to Advisory Committee¹⁹², which, in this case, plays the role of evaluating body.

The advisory committee consists of nine members.¹⁹³ The Committee considers the list and reduces it to three candidates.¹⁹⁴ The nine members are members of parliament representing each party of House of Commons; retired judge representing Judicial Council, representative nominated by the provincial Attorney General Office, representative nominated by provincial law societies and two prominent non-lawyers nominated by Minister.¹⁹⁵

Then Minister of Justice makes the choice and appoints (advices to the prime-minister) from the list.¹⁹⁶

At the same time in Germany one half of the judges out of sixteen are elected by the Bundesrat (representative body of the lands, or upper house of parliament) for one Senate of the Constitutional Court while the other half is elected by the Bundestag (lower house of parliament) for another Senate.¹⁹⁷ This is regulated by procedure stating that,

“of those to be selected from among the judges of the supreme Federal courts of justice one shall be elected by one of the electoral organs and two by the other, and of the remaining judges three shall be elected by one organ and two by the other.”¹⁹⁸

Two chambers agree, which combination of judges to select.¹⁹⁹

The judges appointed by the Bundesrat are elected by two thirds of votes. The judges appointed by the Bundestag are elected by the Judicial Selection Committee (Wahlmannerausschuss) consisting of twelve member representing on the proportionate basis the political parties participating in the Bundestag.²⁰⁰ Parliamentary parties have prerogative

¹⁹² Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?," *Osgoode Hall Law Journal* 44 (2006): 547.

¹⁹³ Ziegel, "A New Era in the Selection of Supreme Court Judges?," 547.

¹⁹⁴ Ziegel, "A New Era in the Selection of Supreme Court Judges?," 547.

¹⁹⁵ Gee, "The Politics of Judicial Appointments in Canada," 109.

¹⁹⁶ Gee, "The Politics of Judicial Appointments in Canada," 109-10.

¹⁹⁷ Federal Constitutional Court Act, (1951), Article 5 (1).

¹⁹⁸ Federal Constitutional Court Act (1951), Article 5 (2).

¹⁹⁹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21.

²⁰⁰ Federal Constitutional Court Act, (1951), Article 6 (1)

in providing the list of potential candidates for the committee.²⁰¹ As Christine Landfried observed, “the constitutional provision in article 94 which states that Parliament as a whole should elect the judges has been changed into the rule that twelve MEP’s should decide who is going to the court in Karlsruhe”.²⁰² Moreover, it should be noted that deliberations of the committee are not subject to the public knowledge. Some element of the confidentiality principle of deliberations is even prescribed by law. According to Article 6 (4),

“[t]he members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.”²⁰³

As put by Christine Landfried, “how the short-listing is done and which criteria are relevant in this process is not public knowledge.”²⁰⁴ The public hearings on judicial nominees are not common in Germany. More than that, the system operates in a way that persons appointed to the court remain mostly unknown to general public. Any exposure to public opinion with regard to voting pattern by a judicial nominee is considered to be a threat to the independence of nominee in question.²⁰⁵ The committee elects the judges also by two-thirds majority (at least eight votes).²⁰⁶

As seen from this review, the evaluation stage in all three jurisdictions differs to significant extent in terms of degree of participation in the process of executive and legislative branches of power, formalization and elaboration of the process itself and its openness and transparency for general public. Without getting into more details and comparison, it can be stated that this particular stage proves absolutely important for the whole appointment process as one by means of which the more balance in resolution of counter-majoritarian difficulty can be achieved at the expense of more active involvement of

²⁰¹ See footnote 105, Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 533.

²⁰² Landfried, "The Selection Process of Constitutional Court Judges in Germany," 201.

²⁰³ Federal Constitutional Court Act (1951), Article 6 (4)

²⁰⁴ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 202.

²⁰⁵ See footnote 110, Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 534

²⁰⁶ Federal Constitutional Court Act (1951), Article 6 (5).

parliamentary bodies at this stage as opposed to nomination of candidates, which is more attributable to executive power virtually in all jurisdictions reviewed.

3.3 Appointment of Candidates

In the United States, the Senate is the body responsible for final approval and appointment of the nominees after having them passed the evaluation stage realized by Senate Judicial Committee.²⁰⁷

Simple majority of votes is required to confirm the appointment.²⁰⁸ It is known that, “of the 159 nominations that have been made to the Supreme Court ..., 36 were not confirmed by the Senate.” Only 11 out of 36, were rejected by the Senate by vote.²⁰⁹ This shows that the Senate rarely rejects nominees proposed by the President and reviewed by Judicial Committee.

In Canada, according to the Supreme Court Act, appointments to the Supreme Court are made by the Governor-in-Council on the advice of the Cabinet.²¹⁰ Based on the developed convention, Prime-Minister acts on behalf of the Cabinet and appoints judges, relying on the advice of the Minister of Justice,²¹¹ although prime-minister is not bound to have consultations with anyone.²¹² This means that appointment process rests solely in the hands of the executive. However, as the result of reforms, after appointment is made the Minister of Justice appears before the parliamentary committee and discusses the candidate, without the

²⁰⁷ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 35.

²⁰⁸ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 40.

²⁰⁹ Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," 48.

²¹⁰ Gee, "The Politics of Judicial Appointments in Canada," 108. Ziegel, "A New Era in the Selection of Supreme Court Judges?," 550.

²¹¹ Gee, "The Politics of Judicial Appointments in Canada," 108.

²¹² Ziegel, "A New Era in the Selection of Supreme Court Judges?," 550.

right of the committee to oppose the appointment.²¹³ This procedure was followed by the Minister of Justice in appointment process of Justices Abella and Charron in 2005.²¹⁴

Another step was added by Conservatives, who won the elections in 2006.²¹⁵ This is the questioning of the appointed person by “an all-party committee of the House of Representatives”.²¹⁶ Justice Rothstein was the only judge to undergo this kind of procedure, which was successful.²¹⁷

In 2008 Prime Minister consulted with the leader of the opposition party and appointed the judge Cromwell, skipping the process, introduced earlier under his supervision.²¹⁸ This was explained by the fact that the appointment was made during the period of parliamentary elections.²¹⁹

In Germany, two-thirds votes are required for the candidates to be elected by electoral bodies, namely Bundesrat and Judicial Selection Committee of the Bundestag.²²⁰ Authors praise the two-thirds majority approval, as this majority makes the appointment process as it allows consensus.²²¹ As stated by Miguel Schor, “by adopting super-majority appointments procedures, the European model of judicial review reduces the power of factions to influence constitutional interpretation.”²²² The election of constitutional justices by two-thirds majority of votes enables opposition parties to actively participate in constitutional court appointment process.²²³ On the other hand, the power of veto granted to leading parties, CDU/CSU and the SPD in this case, can result in a deadlock.²²⁴ To avoid this “an informal division of seats” was

²¹³ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 77.

²¹⁴ Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," 78.

²¹⁵ Gee, "The Politics of Judicial Appointments in Canada," 110.

²¹⁶ Ziegel, "A New Era in the Selection of Supreme Court Judges?," 548.

²¹⁷ Ziegel, "A New Era in the Selection of Supreme Court Judges?," 548-49.

²¹⁸ Benjamin Alarie and Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada," *Osgoode Hall Law Journal* 47 (2009): 8.

²¹⁹ Alarie and Green, "Policy Preference Change and Appointments to the Supreme Court of Canada," 8.

²²⁰ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21.

²²¹ Landfried, "The Selection Process of Constitutional Court Judges in Germany."

²²² Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," 71.

²²³ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 21.

²²⁴ Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge: Cambridge University Press, 2005) 83.

developed between the parties represented in the Parliament.²²⁵ Therefore, two-thirds majority requirement makes “compromise ...a practical necessity” in Bundestag.²²⁶

In Bundesrat the two-thirds majority requirement is also needed to effectively balance the interests of the lands representatives in Bundesrat.²²⁷

The following is subject to criticism with regard to this process: legitimacy of parliamentary committee, diversity (in terms of the increase of lawyers) and confidentiality (in terms of non-public character of the process).²²⁸ The process is deemed to be highly politicized.²²⁹

According to Article 10 of Federal Constitutional Court Act, the Federal President appoints elected judges.²³⁰

The review of the appointment stage carried out above shows that participation and interaction of executive and parliamentary bodies at this stage may vary from purely executive appointments accompanied by rather symbolic parliamentary involvement as in Canada to highly politicized and complicated parliamentary action as in Germany. The openness of this stage to general public also varies significantly in all jurisdictions considered in this review.

²²⁵ Vanberg, *The Politics of Constitutional Review in Germany* 83.

²²⁶ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 22.

²²⁷ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 22.

²²⁸ Landfried, "The Selection Process of Constitutional Court Judges in Germany," 207.

²²⁹ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 22.

²³⁰ Federal Constitutional Court Act, (1951), Article 10.

CHAPTER IV. EVALUATION

As shown in the Chapter One, the relationship between constitutional courts, as “guardians of the constitution” and parliaments directly elected by people is very problematic. The problem lies within the constitutional review by means of which the courts enjoy the power of overthrowing the statutes passed by the elected representatives of people. This manifests itself in so-called “counter-majoritarian difficulty”. This problem has been addressed in numerous theoretical works on this subject with a number of them referred to in this thesis.

As this problem is of more theoretical character and in practical terms could not be overcome fully in favor of popularly elected parliaments for the reason of such overcoming, if possible, getting potentially into conflict with the principle of checks and balances operating within the system of separation of powers with constitutional review being a part of this system.

This conclusion can be drawn firstly on intuitive level prompting developing of such conflict possible, which is, in principle, supported by parliamentary practice as well as some arguments showing impracticability of popular-election of constitutional courts. The practical aim here is to achieve the balance between the maintaining legitimacy of constitutional courts to the extent possible, which can be achieved by means of wider inclusion of parliamentary bodies into the process of constitutional courts appointments, while protecting the role of courts within the system of check and balances. The “politicization” of the constitutional courts is one of the major problems that may develop as a result of attempts to achieve the balance by the parties involved in this process.

The example of German Constitutional Court Appointment process reviewed in Chapter 3 of this thesis parliamentary process shows that politicization may be an outcome of the trade between political parties aimed at achieving balance in representation at the Constitutional Court. It should be noted that the German Constitutional Court Appointment process enjoys the greatest degree of parliamentary involvement among all three jurisdictions considered in this thesis. From the analysis of the formal side of Constitutional Court Appointment processes in the jurisdictions considered, one may conclude that the greater parliamentary involvement in this process creates greater risk of constitutional court politicization. However, the example of Supreme Courts appointments in the United States clearly shows that the trends of politicization of this process are also taking place in that country, which, unlike Germany, has less parliamentary involvement in the process of the court appointments with the House of Representatives effectively excluded from this process.

Chapter two of this thesis addressed the relationship between constitutional courts and parliaments and by doing so emphasized the role of constitutional courts as bodies realizing constitutional review as a check of legislative activity of parliaments.

Constitutional Court Appointment process as a basis of the constitutional court formation can serve in achieving the balance discussed above, particularly by ensuring more parliamentary involvement in this process. The review of constitutional court appointment process in three jurisdictions showed different models of constitutional court appointments, varying by degree of parliamentary involvement.

In Canada Supreme Court appointment process represents the model with the least parliamentary involvement out of three models represented. The involvement is limited to participation of the members of parties represented in the parliament in the advisory committee, which may “trim” the list of candidates proposed by the minister of justice while having no more or less clear procedure detailing such trimming, if any. The other type of the

involvement of parliamentary committee, if this can be accepted as involvement as such, is the interview of candidates already approved for appointment by the executive power without any write to veto these appointments. It clearly shows the decorative character of such “involvement”, which practically has no sense at all.

The United States of America represents the interim level of parliamentary involvement in the process of constitutional court appointment with the power of the Senate to “advice and consent” the President. The role of Senate Judiciary Committee, though advisory cannot be denied as having enough influence on the ultimate result of the Supreme Court Justices appointment process. At the same time House of Representatives has no involvement in this process at all. So, in this case, it would be fair to say of some sort of limited involvement of parliamentary bodies of USA in the Supreme Court Appointment process, although this involvement is much wider and much more formalized and effective than that one in the neighboring Canada.

The German model of constitutional court appointment offers much greater parliamentary involvement allowing both houses of parliament to the appointment process on the parity basis along with the greater role given to parliamentary parties in formation of the Constitutional Court composition. The downside of this process is its excessive closeness, if not secretiveness, effectively barring the wider public from knowledge of specifics of that process as well as knowledge of people involved in the process, including candidates for seats in the court. Unfortunately, the examination of this problem goes beyond the subject of this review and, as such, cannot be taken further within the framework of this thesis.

The issue of publicity is also directly connected with the aim of achieving legitimacy and maintaining the role of the court as a proper check on parliaments’ legislative activity. By letting public know more about current and future judges trusted with realization of the power of constitutional review the greater transparency may be achieved. In these terms, the United

States of America represents the model, which maintains publicity to the greater extent, whereas Germany represents a model absolutely special for its little level of openness.

Following from this review, it can be stated that the wider and more formalized involvement of parliamentary bodies into Constitutional Court Appointment process may help significantly alleviate the problems outlined within the concept of counter-majoritarian difficulty, but, at the same time, it helps to realize natural limitations of such involvement because of necessity to maintain the level of professionalism and expert approach of the court by means of attracting candidates from spheres outside the parliamentary bodies and beyond parliamentary control so that the composition of courts is protected to the extent making the court one of the vital mechanisms within the system of checks and balances of the state.

CONCLUSION

Constitutional court appointment process as the basis of constitutional court formation is playing important role in maintaining the legitimacy of constitutional review was reviewed in this thesis.

This thesis argued in favor of more parliamentary input in the process of constitutional court appointments as the factor contributing to the ensuring legitimacy of the institute of constitutional review. The statement has been substantiated by the examination of the “counter-majoritarian difficulty”, the relationship between parliaments and constitutional courts, particularly their interference with each other; the comparative analysis of the process in USA, Canada and Germany.

By examining the theoretical background mainly referring to the “counter-majoritarian difficulty”, it was substantiated that this problem is of more theoretical nature and its full resolution is not achievable in practical terms.

By examining the institutional background of the relationship between constitutional courts and parliaments the importance of preserving the separation of powers considerations in the parliamentary involvement in the process of constitutional court appointments was shown.

By reviewing of three models of constitutional court appointment process, particulars of each model were demonstrated with the emphasis on parliamentary input present in each of them.

BIBLIOGRAPHY

Legal Acts

Basic Law for the Federal Republic of Germany. 1949. Official translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf>

Federal Constitutional Court Act. 1951. English translation at <http://www.iuscomp.org/gla/statutes/BVerfGG.htm>

Constitution of the United States of America 1787. Available at http://www.archives.gov/exhibits/charters/constitution_transcript.html

Constitution Act of Canada (1867) Available at http://laws-lois.justice.gc.ca/eng/Const/Const_index.html

Supreme Court Act of Canada (1985) Available at <http://laws-lois.justice.gc.ca/eng/acts/S-26/>

Books and journals

Ackerman, Bruce. *We the People: Foundations*. Cambridge, MA: Harvard University Press, 1993.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (London: Yale University Press, 1986) 16-17

Choudhry, Sujit. "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?" *Democracy and Federalism Series 7* (2005).

Favoreu, Louis. "Constitutional Review in Europe, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin and Albert J. Rosenthal Eds., 1990)." In *Comparative Constitutionalism: Cases and Materials*, edited by Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer. Minnesota: West Group, 2003.

Friedman, Barry. "Dialogue and Judicial Review." *Michigan Law Review* 91 (1993): 577-682.

———. "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy." *New York University School of Law* 73 (1998): 333-433.

- Gee, Graham. "The Politics of Judicial Appointments in Canada." In *Judicial Appointments: Balancing Independence, Accountability and Legitimacy*, 99-140. London, 2010.
- Ghosh, Eric. "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries." *Oxford Journal of Legal Studies* 30, no. 2 (2010): 327-59.
- Ginsburg, Tom. "Ancillary Powers of Constitutional Courts." In *Institutions and Public Law: Comparative Perspectives*, edited by Tom Ginsburg and Robert A. Kagan. New York: Peter Lang Publishing, 2004.
- Graber, Mark A. "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power." *Maryland Law Review* 65, no. 1 (2006).
———. "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order." *Annual Review of Law & Social Science* 4 (2008): 361- 84.
- Halberstam, Malvina. "Judicial Review, a Comparative Perspective: Israel, Canada and the United States." *Cardozo Law Review* 32, no. 6 (2010).
- Häberle, Peter. "Role and Impact of Constitutional Courts in a Comparative Perspective." In *The Future of the European Judicial System in a Comparative Perspective*, edited by Ingolf Pernice, Juliane Kokott and Cheryl Saunders. Baden-Baden: Nomos, 2006.
- Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Toronto: Harvard University Press, 2004.
- Jones, Edith H. "Observations on the Status and Impact of the Judicial Confirmation Process." *University of Richmond Law Review* 39 (2005).
- Kommers, Donald P. "An Introduction to the Federal Constitutional Court." In *German Law Journal*, 2001.
———. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2 ed. Durham: Duke University Press, 1997.
———. "The Federal Constitutional Court: Guardian of German Democracy." 603, no. 1 (2006): 111-28.
- Landfried, Christine. "The Selection Process of Constitutional Court Judges in Germany." In *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, edited by Kate Malleson and Peter H. Russel, 196-213. Toronto: University of Toronto Press, 2006.
- Lee Epstein, Jack K. Knight, Olga Shvetsova. "Comparing Judicial Selection Systems." *William and Mary Bill of Rights Journal* 10, no. 7 (2001).
- Macedo, Stephen. "Against Majoritarianism: Democratic Values and Institutional Design." *Boston Law Review* 90, no. 2 (2010): 1029-42.

- Morton, F.L. "Judicial Appointments in Post-Charter Canada: A System in Transition." In *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, edited by Peter H. Russell and Kate Malleson. Toronto, Buffalo, London: University of Toronto Press, 2006.
- Peretti, Terri. "An Empirical Analysis of Alexander Bickel's the Least Dangerous Branch." In *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*, edited by Kent D. Ward and Cecilia R. Castillo, 126-32. Albany: State of New York Press, 2005.
- Post, Robert, and Reva Siegel. "Questioning Justice: Law and Politics in Judicial Confirmation Hearings." *Yale Law Journal (Pocket Part)* 115 (2006).
- Quint, Peter E. "Leading a Constitutional Court: Perspectives from the Federal Republic of Germany." In *University of Pennsylvania Law Review*, 1853-78, 2006.
- Rinken, Alfred "The Federal Constitutional Court and the German Political System," in *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Constitutional Court*, ed. Ralf Rogowski and Thomas Gawron (New York: Berghahn Books, 2002)
- Rutkus, Denis Steven. "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate." 2010.
- Sajo, Andras. *Limiting Government: An Introduction to Constitutionalism*. Budapest-New-York: Central European University Press, 1999.
- Schor, Miguel. "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty." *Minnesota Journal of International Law* 16 (2007).
- Seibert-Fohr, Anja. "Constitutional Guarantees of Judicial Independence in Germany." In *Recent Trends in German and European Constitutional Law*, edited by R. Wolfrum E. Riedel. Berlin/Heidelberg/New York: Springer, 2006.
- Sheive, Sarah Wright. "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review." *Law and Policy in International Business* 26, no. 4 (1995): 1201-33.
- Somin, Ilya. "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the 'Central Obsession' of Constitutional Theory." *Iowa Law Review* 89 (2004): 1287-371.
- Sweet, Alec Stone. "Constitutional Courts and Parliamentary Democracy." *West European Politics* 25: 77-100.
- . *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.
- Tushnet, Mark. "Alternative Forms of Judicial Review." *Michigan Law Review* 101, no. 8.
- . "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty." *Michigan Law Review* 94, no. 2 (1999): 245.

Vanberg, Georg. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press, 2005.

Zeidler, Wolfgang. "The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms." In *Notre Dame Law Review*, 504-07, 1987.

Ziegel, Jacob. "A New Era in the Selection of Supreme Court Judges?" *Osgoode Hall Law Journal* 44 (2006).

Others

A Brief Overview of the Supreme Court. [cited 20 March 2011]. Available from <http://www.supremecourt.gov/about/briefoverview.aspx>.

Ferejohn, John and Pasquino, Pasquale "The Countermajoritarian Opportunity" (paper presented at the Rational Choice and Constitutional Law, University of Chicago Law School, 2010), ([cited 16 march 2011]), available from <http://www.law.uchicago.edu/files/file/Ferejohn.pdf>

Flores, Leslie. *Lessons from Us Supreme Court Appointments: A Quick Look at Justice Sotomayor's Experience* 2009 [cited 25 March 2011]. Available from http://www.tan.org.ph/index.php?option=com_content&view=article&id=77:lessons-from-us-supreme-court-appointments-a-quick-look-at-justice-sotomayors-experience-&catid=50:supreme-court-appointments-watch&Itemid=89.

Grabenwarter, Christoph "Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies" (paper presented at the 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 2011), ([cited 20 March]); available from http://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech_the_sis.pdf.

Uitz, Renáta. *Judicial Independence: Fundamentals Revisited through International Instruments and Constitutional Jurisprudence* 2008 [cited 20 March 2011]. Available from http://www.lprc.kz/en/index.php?option=com_content&task=view&id=82.

Wöhrmann, Gotthard. *The Federal Constitutional Court: An Introduction* InterNations, 1996 [cited 20 March 2011]. Available from <http://www.iuscomp.org/gla/literature/Inbverfg.htm>.

Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty. 2005 [cited 14 March 2011]. Available from <http://legaltheorylexicon.blogspot.com/2005/06/legal-theory-lexicon-047-counter.html>.

Proposal to Reform the Supreme Court of Canada Appointments Process. 2005 [cited 25 March 2011]. Available from <http://www.justice.gc.ca/eng/dept-min/pub/scc-csc/2.html>.

The Court and Constitutional Interpretation. [cited 20 March 2011]. Available from <http://www.supremecourt.gov/about/constitutional.aspx>.

The Federalist No. 10. [cited 15 March 2011]. Available from <http://www.constitution.org/fed/federa10.htm>.

The Federalist No. 78. [cited 20 March 2011]. Available from <http://www.constitution.org/fed/federa78.htm>.