Selecting Constitutional Judges Randomly

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Abstract: This article discusses from the perspective of democratic theory an innovative proposal for the selection of constitutional, supreme court, or federal judges that aims at combining the values of expertise and political independence. It consists in combining a certification process – selecting a pool of properly qualified candidates – with a random selection among this pool. We argue that such selection procedure would better respect the separation of powers and the specific legitimacy of courts, and we champion this two-stage mechanism vis-à-vis other, more traditionally employed, selection procedures. We then deal with a diversity of objections to our proposal and conclude by taking stock of both its virtues and limitations.

Keywords: judicial selection; separation of powers; judicial independence; judicial legitimacy; sortition.

Introduction

In 2019, a citizen initiative was launched in Switzerland, proposing to have federal judges selected by lot among qualified candidates instead of being appointed by Parliament (see appendix). Although the idea might seem strange at first sight, at least for lawyers and for those unfamiliar with sortition, we believe that it is supported by strong arguments, which we were already considering when the Swiss initiative occurred and which this article aims to explore in depth. Because our focus here will be on general theoretical arguments about different methods for selecting judges that can be used in sundry democratic contexts, and because we do not want to commit to everything that is promoted by this particular initiative, we will abstract away from the Swiss case..

This issue of the best method for selecting high court judges[1] matters, and not exclusively so in Switzerland. On the one hand, it is part of a broader discussion on the legitimacy of an institution which has gained political power in many countries to determine the meaning and scope of central aspects of our constitutional democracies, such as fundamental rights and the rules of the political game (Hirschl 2004). As this institution gains power, normative questions about its legitimacy become increasingly pressing, and selection methods are one of the key aspects of this problem.[2] On the other hand, many countries are

[1] We will use the term 'constitutional judges' or 'constitutional courts' to refer to constitutional courts stricto sensu, federal courts and supreme courts.

[2] Of course, legitimacy is not reducible to this dimension. We here circumscribe our analysis to this procedural aspect. As a result, although our proposal may have bearings on the quality of the courts' decisions, for example, by making judges less partisan, our focus is not on output legitimacy. This problem deserves separate treatment.

experiencing a shift of power to the executive, threatening the separation of powers (Arato 2019; Rosanvallon 2015). It is in this context that increasing the independence of courts could be considered as desirable in order for them to be able to act as a check on the actions of overly powerful executives. And one way of fostering this independence is by reducing the politicization of the selection process.

Although many of the arguments here considered apply to the selection of all sorts of judges, we will focus on supreme court justices, federal[3] and constitutional judges. It is for this particular category of judges that the considered procedure is the most relevant, because there will usually be more qualified candidates than positions to fill, and that political intrigues are to be expected given the political impact usually carried by their decisions. It is also for this category that the question of legitimacy is the most pressing.

Broadly conceived, legitimacy pertains to the reasons why individuals may accept decisions or norms imposed upon them. Different institutions will ground their legitimacy on different criteria. Representative institutions, for example, will be accepted and legitimate foremostly due to their elective nature, enabling citizens to select and sanction their representatives. The legitimacy of constitutional courts is usually based on different sources. One potential source of legitimacy is the alleged political independence of the judges, a broad category including independence from partisan ties, from electoral incentives and pressures from political actors. By being free from party membership and not subject to electoral incentives, they are expected to be better placed for impartial legal assessments of the "correct" interpretation of the constitution in a given case (Doherty and Pevnick 2013; Kornhauser 1995; Segal and Spaeth 2002: 178). Another potential source of legitimacy is their expertise in constitutional law. In what follows, we assume that these two sources of legitimacy are not very controversial, although we will consider arguments against the political independence of judges.

From this viewpoint, anchored in the ideal of clearly separated powers, the best method for selecting constitutional judges should be able a) to guarantee or maximize political independence, and b) to identify expertise. Briefly stated, the reason is that courts have a specific function, which is based on the interpretation of law. And if we want judges' perspective to be law-centered rather than political or partisan (the *raison d'être* of a separate power), expertise in law should be the only relevant selection criterion, and political independence should be fostered. In light of this, the frequent practice of having constitutional judges appointed by political actors does not stand scrutiny. Randomly selected judges, in comparison, would maximize political independence, or so we shall argue. However, because expertise also matters, we shall argue that they should not be selected among the whole citizenry, but among a set of constitutional "experts",[4] which brings the proposal closer to

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In other words, although central, nomination mechanisms are but one among other factors contributing to the legitimacy of courts.

[3] The Federal Supreme Court of Switzerland is not exactly a constitutional court as it does not have the power to review legislation.

[4] We assume that those experts are foremostly judges, but our argument also accounts for legal systems allowing, for instance, prominent constitutional lawyers, law professors, or other individuals who are well-versed on matters of constitutional law and could be selected as constitutional judges.

practices of certification, where constitutional judges are selected based on competence by another judicial body (like the General Council of the Judiciary in Spain, for example).

The inclusion of juries in judicial procedures can be partly interpreted as a first historical attempt to combine the legitimacies of expertise (the judge) and independence or impartiality (the jury), in contexts where there were doubts about the political independence of judges – for example because they were appointed by the King (Vidmar 2000: 1; Vogler 2001: 525). The proposal we here consider, however, although discussed by a few scholars, [5] has never been tried, to our knowledge, in judicial arenas.

In the next section we thus champion a combination of political independence and constitutional expertise. We then elaborate a selection mechanism based on random selection among constitutional experts and compare it to alternative modes of selection. The following two sections consider objections to random selection and to restricting the franchise to constitutional experts. We conclude by taking stock and by offering some concluding remarks on the limitations of our proposal as well as points of attention for the implementation of such reform.

Before we proceed, two caveats are in order. First, our argument is not intended to champion particular forms of judicial review of legislation. As it happens, one of us has argued against granting the judiciary the final word in the determination of constitutional meaning (see Bello Hutt 2017). Our ambition here is different and more modest. Irrespective of the form of judicial review adopted, we argue that judicial practices at the highest hierarchical levels should guarantee political independence and should be guided by legal expertise. And a combination of certification and random selection is one promising path towards this end.

Second, our focus on selection mechanisms addresses only one subset of possible sources of politicization of courts. Politics could affect judicial decision-making through avenues not related to how judges get their position in the bench (e.g. reducing the powers of the court and/or its budget, or internally, by judges themselves committing to certain methods of legal interpretation, inter alia).

What do we expect from judges?

The value in judicial practices must necessarily come from judges' ability to see things differently from elected politicians (Grimm 2019: 308-309). If judges were similar to elected politicians, they would lose their distinctive function, as we shall argue. Three judicial qualities thus seem particularly important:

- Respect for fundamental rights.
- Excellent legal knowledge.
- Independence of judgement.

[5] The idea has already been defended in the US context. Davidow (1981) suggests selecting by lot among a pool of candidates *nominated* by a broadly representative commission elected with proportional representation. The proposal we consider here differs in replacing this nomination with a more formal and less political certification process. Bunting (2006) suggests selecting by lot among the pool of people admitted to the state bar, while rejecting a further certification process.

The first is relatively obvious and not particularly distinctive of judicial practices. Although discussions can be held on the content of fundamental rights, and about the extent to which politics plays a role in the determination of their meaning, any agent, organ and individual must respect them. The last two, however, are distinctively expected from courts. They therefore attract most of our attention here. More particularly, independence of judgment is what most strongly motivates the idea of randomly selecting judges. Hence, it needs be spelled out more carefully.

What does independence mean?

We usually expect from all kinds of judges some independence of judgment, because we want them to adjudicate impartially. Accordingly, they should not be biased in favor of one party, should not have personal interests at stake in the case, and should not have affective ties with any of the parties. They should also be independent in the sense that they are immune to corruption. Judges are expected to ground their decisions on legal sources, according to relevant and properly produced evidence, weighing the arguments of the parties against proven facts, using rational and reasonable legal methods.

However, full independence of judgment, that is, the absence of any external influence on judicial reasoning, is certainly an illusion. We know that judges, as any socialized human being, are inevitably influenced in their judgments by their political and religious beliefs, their education, their context of socialization, their representation of the legal system, etc.[6] Moreover, legal sources like legislation and the constitution are both the product and the source of political disagreement. In particular, the effect of constitutional judicial judgments is undoubtedly political 'insofar as their object is political' (Grimm 2019: 308). Therefore, we should not turn a blind eye to the risks of political biases. Put in Hartian language, the noble dream is still dream.[7]

So, what kind of independence of judgment can we reasonably expect from judges? We can first expect that they cut off any links with political parties or militant associations. This is a matter of professional ethics. It will not fully guarantee *political* independence, however, if judges are appointed by political actors, such as the President, deputies or a minister. This almost inevitably creates political dependence. If judges want to access some position, they will usually have to please the relevant political actors. And if they have benefited from a political favor, they will likely feel a pressure to reciprocate, even if they cannot be deselected.[8] The fact that constitutional judges are either appointed for life (or until

[6] Martin et al. (2004) compared predictions of US Supreme Court decisions in 2002 and 2003 for so-called legal and for attitudinal models. Both models, one explaining judicial behavior through commitment to the law, the other by looking at the ideological attitudes and values of the justices, correctly predicted two thirds of the decisions. These findings might not necessarily apply in other contexts, as these models are mostly employed in the United States. And to be clear, we are not assuming the prevalence of one model over the other.

[7] The noble dream "represents the belief, perhaps the faith, that … an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of a particular constitutional provision, statutes, or available precedents appear to offer no determinate guide" (Hart 1983: 132).

[8] Note however that this is not the case in Germany, where MPs elect members of the Federal Constitutional Court through secret ballot and without knowledge of the candidates' personal circumstances. See Gesley

they freely choose to resign) or for a single term reduces the risk of political influence, because they do not need to seek favors from anyone in order to keep their jobs. Additionally, political dependence may be further controlled by decoupling the time of the judges' appointment from other political institutions' electoral periods. Yet, even in these cases the problem does not fully disappear; judges who may have benefited from a favor are still expected to reciprocate, or at least to be faithful to the expectations of those who helped them gain their position (e.g., Griffith 1997: 10).

This concern with judges' independence does not commit us to endorsing an exclusively attitudinal approach to judicial decision-making. Legal sources and institutions matter as well. Individuals operating through procedures and institutional constraints are influenced by these (Bowles 2016). In the case of judges, they operate in the framework of a legal system, which demands from them to follow, for example, certain sources (legislation, precedents, constitutions, inter alia) and not others. This limits both their independence and the impact of the selection mechanism on the possible politicization of their decisions.

Why does political independence matter for constitutional judges?

One important reason why political independence matters, nonetheless, is that political dependence harms the separation of powers. In extreme cases, for example, the judiciary may even lose its distinctive function, for instance where the chance of seeing judges oppose a decision made by the president, the parliament or the government is null.[9] If we believe that constitutional judges matter, they must at least have the ability to make a difference – be it by breaking down a law proposal, merely slowing down the legislative process, or by policing the paths of political change (e.g., Ely 1980). This does not mean that they should often intervene, but that they should be offered the freedom to do so when needs be, even when their decision contradicts the will of those who appointed them, without any fear of sanction (other than public accountability, which already seems to influence them in practice (Dahl 1967: 155, Fisher 1988: 244; Kramer 2004: 970). Constitutional courts should operate as 'warning signs', so to speak, with the mandate and ability to intervene when constitutional rights are being infringed upon or jeopardized, without that faculty necessarily translating into a strong power to nullify legislation, yet always with the guarantee that the power affected by the decisions will not have the tools to sanction judges on political grounds. Supreme and Constitutional courts are counter-majoritarian institutions (Bickel 1986). For that reason, they cannot be tied to the majority in power. And this is why the frequent practice of having judges appointed by political actors raises problems: because it is often the majority who has the power to nominate judges, they are partly bound to the majority's political preferences.

In contexts of frequent political alternation, the problem might be deemed less serious, as the opposition is likely to have the opportunity to appoint its own judges once in power. The same holds for contexts where different parties are guaranteed (usually through an informal rule) the possibility to nominate their own judge, regardless of their presence in

(2016). This particular argument against nomination by political actors is thus weaker when political nomination is conducted that way.

[9] Note that, even in authoritarian contexts, the chance will often be close to null rather than null, because there is always a small chance to see judges disobey and decide against the interests of the executive.

government. Two problems nonetheless remain in these contexts. First, judges are reasonably expected to have their preferences aligned with those of the major parties, who tend to rule. A court with judges of competing political militancy might be an improvement compared with politically homogeneous courts, but it is still distant from the ideal of political independence and attention to minority rights. Second, if judges tend to vote following party lines, the law-centered function of the court is jeopardized. It seems illusory to count on what a judge from the Belgian Constitutional Court called "the miracle of transfiguration" (Biermé 2019), i.e. a radical change in attitude produced by the fact of becoming constitutional judge which would spontaneously free judges from their past political affiliation. Admittedly, party-member judges might enjoy more freedom than MPs, but the fact that they are tied to a party still harms the independence of the court and the separation of powers.

Why are judges usually nominated (and not randomly selected)?

Political nomination (or appointment) is obviously a way for the executive (and less frequently the legislative) branch to preserve its power, to limit the separation of powers. This might be the most likely *explanation* for this practice, but it does not offer a compelling normative argument.

One interesting argument in favor of nomination by political actors (also applying to direct elections of some judges by citizens, as is practiced in many US states) despite the cost for the independence of judges, is that the latter are also expected to be in line with majority preferences. According to this argument, the judiciary should not be reduced to a separated power checking the other two. It is also responsible for the application of democratically established rules. Accordingly, "judges should be sensitive and responsive to the political, economic, social, moral, and ethical views held by a majority of citizens" (Dubois 1986: 34). In this respect, their independence should not be total. They should be accountable if not to the whole citizenry, at least to its elected representatives, which matters for their democratic legitimacy (see Fiss 1993; Russo 2019: 15-16; Sanders and von Danwitz 2018).

There thus seems to be a trade-off between independence and accountability (or responsiveness), both of which are potential sources of legitimacy for the courts.[10] Direct elections of judges and short mandates give priority to (popular) accountability, whereas life-long mandates seemingly prioritize independence. The independence of judges is nonetheless limited, in this model, by the politicization of the nomination process. And the more the process is politicized, it seems, the more courts lose the legitimacy that the democratic appointment was supposed to confer.[11]

[10] Rosanvallon (2008) has documented the pluralization of sources of legitimacy in contemporary democracies. He convincingly argues that elections governed by majority rule provide only an imperfect legitimacy, which needs being complemented by other sources of legitimacy such as reflexivity or impartiality. On judicial legitimacy and independence, see Sanders and von Danwitz (2018: 804-809). On impartiality or independence-based legitimacy and sortition, see Sintomer (2011: 255-278); Courant (2018); (Mellina 2019).

[11] Thus, for example, Sanders and von Danwitz (2018: 806) report that trust in the US Supreme Court has dropped from 56% in 1985 to 36% in June 2016, which correlates with an increased politicization of the appointment process.

These problems seem to be quite obvious. Yet, the frequent use of nomination puts us in the position of taking it seriously. More importantly, it puts us in the need to justify why random selection has not been as used as nomination. Hence, before coming back to the accountability argument further below, let us then formulate a hypothesis regarding the widespread neglect of random selection as a method appropriate for the selection of judges. It cannot be the case that the method was forgotten in the same way as it was forgotten for the selection of political representatives, despite frequent ancient practices (Manin 1995; Sintomer 2011). It cannot because the judicial use of random selection is the only one that persisted through the ages, with popular juries.

Our hypothesis is that random selection is rarely considered as a method for selecting judges,[12] probably because juries are less popular among lawyers and politicians than in the eyes of the public.[13] The aggregate tendency, worldwide, is a reduction of the power and use of juries (Hans 2008), partly because adjudication is more and more associated with a certain legal expertise (Tulkens 1995: 102-104), whereas random selection assumes an equal capacity for judgment among those who are eligible (Schwartzberg 2014). Thus, it might be the case that the dominating practices – nomination and certification – are held to be more able than random selection to select properly qualified judges. It is to the appreciation of the different merits of these competing selection mechanisms that we now turn.

Random selection compared to other methods

Random selection is but one among a variety of possible selection mechanisms, including:

- Nomination by the President (with approval by Parliament)
- Nomination by the Head of the government (with approval by Parliament)
- Nomination by the Head of State after proposal by the Senate
- Nomination by Parliament
- Nomination by a judicial council
- Election by citizens
- Election by judges
- Certification (passing an ad hoc exam or having met some qualifications)
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It helps appreciating the value of random selection to see the advantages and drawbacks of these other modes of selection.[14] We have already discussed the advantages and disadvantages of *political* nomination in the previous section. We now turn to elections, nomination by a judicial council, and certification before turning back to random selection.

[12] Switzerland seems to be different in this respect. As Mellina (2020; forthcoming) shows, random selection was used as a complement to elections for the selection for judges and juries alike, and enjoyed important credibility until the middle of the 19th century. It is then abandoned because it is gradually considered too irrational in state structures and institutions gradually marked by a more rational and systematic organization.

[13] A notable exception is Ghosh (2010).

[14] Here we take some inspiration from Courant (2018).

Elections

Elections have the advantages of selecting widely acceptable candidates and of grounding their legitimacy on popular authorization. Thus, historically, it seems that the choice to elect judges (in the USA at least, from the Jacksonian era onwards), was partly motivated by the willingness to provide popular legitimacy to courts, so as "to allow them to effectively rival legislative and executive power" (Dubois 1986: 35).

However, elections (whether partisan or not)[15] suffer from at least two drawbacks. First, they incentivize *conformity with majority preferences*. In order to be elected, a person needs to make herself attractive to voters, and candidates sharing or endorsing the views of the majority therefore have an advantage. If elections are not recurring, the problem is less salient, because a judge could make herself attractive prior to the election and then act in complete independence from public opinion. Be that as it may, one thing is clear: elections politicize the selection process. Voters are likely to choose based on candidates' political reputation, and winners are therefore likely to share the political preferences of the majority.

If judges are elected by citizens, they might thus become insufficiently distinctive from elected politicians. This is what the US Supreme Court recognized for example in Gregory v. Ashcroft (1991) when denying any categorical distinction between elected judges and other representatives (see Bunting 2006: 187). If, in contrast, judges are elected by other judges, their views are more likely to differ from public opinion, which could be epistemically valuable if, due to their institutional duties to publicly justify their decisions using legal sources, fundamental rights among them, we could be confident that the median judge is more respectful of and concerned with rights than the median voter.

Here, however, comes the second difficulty with elections. Although they are intended to allow voters to select the best among them (Manin 1995), we have *no guarantee that voters will base their choice on relevant criteria* (following our starting assumptions: legal expertise and independence of judgment). Elections give an advantage to charismatic candidates (Shamir 1994) which are not necessarily the best judges. If judges are elected by other judges, the problem might be less salient, as they are likely to be better informed about the candidates' qualities *qua judges*, but it does not disappear. There is no guarantee that the legal expertise of the potential candidates will be the only (or even the primary) criterion of selection.

Moreover, even in the case of elections by judges, the process remains politicized, which could harm the perceived legitimacy of selected judges. Imagine that there is a dominance of leftist judges, and the population knows it. Given the power that constitutional judges can have, it is plausible to expect the majority of voting judges to make sure that a leftist is selected. Given that political alternation among judges would then be unlikely, citizens with rightist preferences would find no reason to grant (independence-based) legitimacy to the constitutional court. Or suppose the selection process is not politicized, but thought to be politicized by the public. Then, the problem of legitimacy comes back.

[15] Scholars of judicial selection systems in the US usually distinguish between *partisan* and *non-partisan* elections (see Bunting 2006; Webster 1995). Our arguments below apply similarly to both, but strongly to partisan elections.

Elections, either by citizens or other judges, are thus an unattractive selection method when the aim is to generate legitimacy based on competence and political independence. They are usually defended from perspectives that accept the political nature of adjudication. If judges necessarily make *political* decisions – taking side in partisan conflicts based on ideological rather than strictly legal considerations –, then they should be accountable to the wider public as much as other political actors (Dubois 1986). Yet we reject this view. Although we recognize that the law does not speak for itself, that there is no clear constitutional truth and that the interpretation of the constitution is ultimately grounded on political, moral or philosophical reasons (i.e. reasons external to legal interpretation, many of which are political) (Bello Hutt 2018a), it is our view that *if* we want an independent judiciary, especially at the highest hierarchical levels, we should try to maximize its political independence.[16]

Mind you, we do not argue that courts should never be responsive to long-term changes in public opinion. Yet, to the extent they do it is not because the nature of their function mandates them to express the views of the public on what the law means. Rather, the practice is better accounted for by saying that judges interpret and apply the law, and that the stability of their interpretations is as a matter of fact dependent on their long-term acceptance by a large part of the public.

Nomination by a judicial council

It seems to us that the drawbacks of an election by judges are likely to affect a process of *nomination* by a judicial council as well. Unless there is a guarantee, by other means, that this judicial council is entirely depoliticized, which seems unlikely, the selection procedure has many chances to be politicized in the same way that an election by judges – maybe in a more covert form.[17] Here, the distinction between nomination and election is thin, because members of the judicial council must reach an agreement before nominating a judge. The decision method might be more consensual than strict majority rule, due to the lower number of people involved, but the risk of politicization remains.

Granted, nomination by a judicial council offers better prospects of political independence and competence-based selection than nomination by political actors (or *political nomination*). However, the risks of a selection importantly based on political criteria is still quite high compared with random selection, as we show below.

[16] To be clear and as mentioned at the outset, we are not committing ourselves to an institutional arrangement granting judges the faculty of strong judicial review of legislation. Judicial review can take place without granting judges the final word in the determination of counts as constitutional.

[17] As critiques wielded against the Spanish *Consejo General del Judicial* show (Serra 2013: 299-300). There are interesting proposals to balance politically (or reduce partisan struggles in) these judicial councils or nominating commissions (see for example Webster 1995: 39-42), but random selection always scores better in terms of depoliticization.

Certification and Random Selection

Because neither elections, nor nomination, nor random selection guarantees a selection based on relevant criteria, one might prefer certification (also called merit-based selection), a selection mechanism directly based on competence proven through to an examination procedure. One can expect an examination, properly designed, to track more accurately the relevant competencies required for the job we expect judges to perform.[18] This examination can take (at least) two different forms: either a test or the review of a candidate's profile/CV by an independent commission of experts (whose procedure of selection then also needs to be thought), based on publicly available selection criteria. The Swiss citizen initiative mentioned in the introduction opted for the latter (see appendix).

Selecting judges through certification makes a lot of sense, but suffers from some limitations that, on its own, make it insufficient. It makes sense, first, because compared to elections and nomination, it is potentially less politicized.[19] Second, it is already widely practiced at lower hierarchical levels of the judicial system,[20] without much contestation. Third, if there are some specific competencies that make a good constitutional judge, a proper examination has higher chances to identify the right candidates than elections, political nomination or random selection.

Beyond the risks of political instrumentalization of the examination procedure, the main limitation of certification, taken in isolation, comes from the fact that many people will usually be endowed with the relevant competencies and that a national examination is unlikely to single out a few as clearly standing out, as *the right persons* for the job. Some mechanism must therefore be found to choose judges from this pool of certified candidates – at least when the latter outnumber the positions to fill.

This is where random selection enters the picture. Once a preliminary selection has been made through certification, a further selection still needs to be made to end up with the right number of judges or the one person replacing a former judge. Two different lines of argument then lead to random selection. The first suggests that sortition is warranted when no meaningful comparison can be made between different alternatives (Bunting 2006: 168; Elster 1989: 107). This might often happen in the selection of judges through certification. The second reason to prefer sortition is this: while preserving the benefits of certification obtained in the pre-selection, random selection maximizes political independence in the remaining choice. The candidate selected by lot does not have to please anyone to be selected, to raise campaign funds, and does not have favors to return once selected. What is more, a certification procedure tracking basic competencies and selecting a plurality of candidates is less likely to become politicized and manipulated than one supposed to identify a single best candidate. The random element mitigates political conflicts by leaving a fair chance to competing political groups. In comparison, an exclusively certificatory procedure would

[18] See however Reddick (2001) on the failure of merit-based selection, as it is practiced in the US, to select judges of higher quality than elections.

[19] Nevertheless, if the stakes are high, one should expect political battles over the relevant competencies and the proper way of tracking them through the test or preselection procedure.

[20] Consider, for example, Chile, where in order to become judges, they need to spend six months in a Judicial Academy.

likely increase political battles among the actors in charge of the process. Through the combination of these two logics (certification and random selection), we thus maximize the chances of having judges combining the virtues of competence and independence.

A similar combination of certification and random selection already exists in the composition of the California Citizens Redistricting Commission,[21] which aims at drawing district lines in a non-partisan way in order to ensure fair representation for all Californians (Courant 2019: 232). Commissioners are selected through a process administered by state auditors comprising a revision of essays, letters of recommendation, background investigations, and public scrutiny. From a pool of 36 candidates, 8 commissioners are randomly selected, review the remaining applicants, and select the final 6 commissioners.

Two different sets of objections can be formulated against the combination of certification and sortition in the selection of constitutional judges. In what follows, we start by considering the objections to random selection, which is the most controversial element of our preferred selection method. We then push the reflection further and consider objections to certification.

Objections to random selection

Accountability Deficits

If independence was the only virtue of good judges, random selection would be an unrivaled t selection method. However, as was mentioned earlier, judges are also expected by some to be responsive to societal changes. Yet random selection is by itself incapable of creating a relation of accountability: randomly selected judges are neither accountable to a constituency, as is the case with elections, nor to elected representatives, as is the case with political nomination. The risk engendered by random selection is then the possibility of judges making politically-motivated decisions or sometimes even shaping policy (Dimino 2005) without having to account for them, and without being vulnerable to sanctions. This may bear on the legitimacy of randomly selected judges.

Three different issues should be disentangled here:

- The possibility to sanction judges in cases of misbehavior.
- The necessity of judges being responsive to public opinion.
- The sources of judicial legitimacy.

Regarding the first concern, it is possible to imagine accountability mechanisms other than reelection. In the Swiss citizen initiative, for example, the Federal Assembly can remove a judge through a simple majority vote in case of breach to one of his/her professional duties.[22] Alternatively, we could imagine judges being sanctioned by some judicial council.[23]

[21] https://wedrawthelines.ca.gov.

[22] See appendix.

[23] The Spanish General Council of the Judiciary, for example, is in charge of the disciplinary system of the judiciary.

What matters is then to clearly circumscribe the rights and duties of judges so that they can be sanctioned for clear violations of these (and not for arbitrary or unclear, probably politically-motivated reasons). Thus, it is not true that randomly selected judges would necessarily escape any form of accountability. Accountability is not reducible to reconduction mechanisms; it can also take a more deliberative form, such as an obligation to publicly provide reasons for one's actions (Mansbridge 2009: 370; Sanders and von Danwitz 2018: 808). Then, once we take this wider view on accountability, it is a matter of finding the proper institutional tools to make judges accountable without jeopardizing their independence.[24]

Yet, the second issue remains: randomly selected judges would not be democratically accountable in the sense that they could not be sanctioned for deviating from or for being unresponsive to the majority's legal and political opinions.

But this is not problematic. Our view is that no such alignment between the content of judicial decisions and the preferences of the majority of the public is to be normatively expected as a matter of judicial duty (Bello Hutt 2018b: 1145). Notwithstanding this, it seems to us that even for those who value majoritarian accountability, the cost of using these selection methods (periodic elections or nominations with recurring confirmations) might be too high given the deleterious effects on independence. As we argued above, if we want judges to be moved primarily by legal (not political or partisan) reasons (Grimm 2019: 308-309), these selection methods are not attractive; they excessively politicize the judiciary.

Regarding the third issue, legitimacy, it seems to us that we should value a firm independence of judges from majority preferences. As mentioned, if there is a need for an independent third power checking the others, it makes sense to guarantee its *de facto* independence. This point may be stronger yet in processes of 'presidentialization' of politics (Rosanvallon 2015), currently happening in several democracies, where Parliaments have lost much of their power to control the executive. In some contexts, this shift of power towards the executive goes with clear attempts to muzzle the judiciary, sometimes under the pretext of providing it more democratic legitimacy (Sanders and von Danwitz 2018). But separation of powers entails that at least one of these powers is sufficiently independent from the others. And this means that the source of legitimacy of this third power needs to be of a different nature: it will not be democratic accountability (at least not understood in the mere 'sanction' sense), but political independence, and the potential for impartiality and reflexive freedom that goes with this independence (see Rosanvallon 2008; Sintomer 2011: 255-278). Of course, this does not guarantee that judges will always make right decisions. But the combination of certification with random selection probably maximizes the chances of seeing qualified judges adjudicate based on valid legal reasons, while minimizing the risks of political biases.

Hiding political biases

A second objection questions the willingness to depoliticize the judiciary by pointing out the risk of simply hiding the use of political power to the public. We should assume, the objection goes, the political character of judicial practices at the level of Supreme, Federal and

[24] On the diversity of tools, see Cappeletti (1983).

Constitutional courts. Accordingly, it is better if judges have a clear political identification than if we pretend that they are independent although they are not.

There are two reasons for thinking that, in our model, judges would still be politically biased. First, the certification process will act like a filter. Based on empirical evidence, it is safe to expect this process to lead to the exclusion of some social and political profiles because those making the selection have their own biases and because there is certainly a correlation between the expected qualifications and some socio-demographic characteristics.[25] We will consider this issue in the next section, as it targets certification.

The second – quite obvious – point is that random selection does not make individual political biases disappear. It simply cuts some ties of political dependence, but it does not suffice to depoliticize the judiciary.

This is a point that we accept. The proper motivation for combining certification and random selections is not exactly to depoliticize the judiciary, but to depoliticize the *selection process*. And the expectation is not that judges will not be politically biased anymore; it is that they will face *less incentives* to act based on partisan motivations, which is beneficial from the point of view of judicial independence. Moreover, we do not expect that our proposal guarantees that judges will not have political motivations. That would be wishful thinking. Rather, what one can do is to imagine institutional mechanisms that, put in Elster's terms, make it more likely for judges to be constrained by the "civilizing force of hypocrisy" and therefore reason in public terms rather than based on private motives (1998: 103). That is, mechanisms that on the one hand make judges avoid perfect coincidences between their personal political interest and the content of the decisions and that, on the other, should such coincidence exist, force judges to offer public and principled reasons that underpin those decisions.[26] Maximizing judges' independence does not guarantee that, but it probably maximizes the incentives to do so. What is more, as we shall see later, if the legitimacy of courts is not grounded in a political authorization process, judges will need to build their legitimacy on other aspects, such as the quality and public acceptability of their justificatory statements.

So, while we admit that there will always be judges with political or partisan motivations, whatever the selection method, we reject the claim that it is better to have judges with a clear political identity than judges with hidden political biases.

A slightly distinct claim can be made in some political contexts with a consensual political system (eg. Switzerland). Given that many parties take part in government coalitions, federal judges represent a diversity of parties. In such context, one might believe that it is valuable to have all sorts of political orientations (and linguistic profiles) represented in the bench of judges (see Russo 2019). Random selection is often praised for producing more diversity than other selection mechanisms, but in the case at hand, the reduction of the pool of eligible candidates by certification could, so the argument goes, lead to an excessively homogeneous bench of judges compared with nomination by a plurality of political parties.

[25] Consider for example that the current USA Supreme Court's members all attended elite "Ivy League" universities. It has also been argued that merit selection was detrimental to religious minorities, favoring Protestants over Catholics and Jews in the US (Glick and Emmert 1987).

[26] The detail of these mechanisms however, cannot be discussed here.

Again, two arguments should be distinguished. First, the idea that it is preferable to have judges with clear political identities, a claim that we already rejected. Even if, in this case, there is a greater variety of political identities, the fundamental problem remains: judges are incentivized to act based on political motivations (in Switzerland they are all party members).

Second, there is the claim that political nomination in consensual contexts guarantees more political diversity among judges than the method coupling certification with random selection. The latter claim is difficult to consider in the abstract. It is empirical and will depend heavily on the specificities of the certification process. However, if political nomination in consensual political systems can guarantee a partisan balance, one could reasonably expect random selection to offer better prospects of *social* diversity, which may be at least as important, as pointed out by the advocates of the Swiss initiative (Russo 2019: 11). Then, the point to take on board is that the certification process should ideally be conceived to foster diversity, in order not to jeopardize the benefits that random selection can offer in terms of social diversity. Yet the specifics of this process are beyond the scope of this article.

Risks of manipulation

A last objection to random selection should at least be mentioned. Although the method is often praised for its capacity to neutralize disputes and power relations (Dowlen 2009), it is not itself immune to manipulations.

Whenever the stakes are high, either because a lot of money or genuine political power is involved, this risk will be real. Whether the risk is higher than under other selection procedures is not clear, though; no method escapes risks of corruption. Yet one point potentially counting against random selection is that, since candidates are in no need to make their views public, since ballots cannot be recounted, and since the procedure's reliability heavily depends on the trustworthiness of those running it, the random procedure is, in a way, less transparent than elections (López-Guerra 2011) or nomination. It could thus generate more distrust, but this is an open empirical question as well.

What could be done to meet this criticism is to ensure a balanced supervision of the random selection process. The latter could be supervised by a board composed of representatives of *all* parties having seats in Parliament, including the minority, and possibly ordinary citizens exerting external scrutiny. Again, this is an aspect attention should be paid to when designing the process, but not a fatal objection to our proposal.

Why certification?

Excessively elitist?

Some people could be convinced by the virtues of random selection, but worried about the other part of our proposal: the preselection through certification. Why not enfranchising all adult citizens? Are we conceding too much to existing selection practices?

Although we see good reasons to include ordinary citizens in juries, as already practiced, and even in a new popular legislative chamber selected by lot (Vandamme and

Verret Hamelin 2017), it is hard to deny that the task requires some degree of legal expertise, at least on some constitutional matters. Judging the conformity of a given law with constitutional principles is not very accessible to the wider public. And it is probably less accessible than judging the *desirability* of a law (as would be the case in a randomly selected legislative chamber).

Barring theoretical discussions about whether courts are political institutions, it is at least clear that judges themselves strive to account for their job as one guided by legal and not political, i.e. partisan considerations. Constitutional law is not different. Cases with clear political content are still decided by courts on legal merits only. Legal realists might disagree,[27] but the point is that the public story that judges tell is one about law, and about law only, and departures from that understanding carry the burden of justification. Consider two recent decisions by the UK Supreme court with high political impact, informally known as Miller 1 and 2, where the court, while acknowledging the political character of the issues at hand, strived to describe them as strictly legal in character. In Miller 1, referring to the UK ministers' announcement of their willingness to terminate the UK membership of the European Union, the court said that the case had 'nothing to do with issues such as the wisdom of the decision …They are not issues of *law which are brought before [judges] by individuals and entities exercising their rights to access the courts in a democratic society'.* In Miller 2, the court insisted on the same point: 'it is important to emphasize that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union. *The issue is whether the advice given by the Prime Minister to her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued … was lawful'*.[28] This phrasing is not a form of legal cynicism, but a way of accounting for what judicial duties are all about.

The risk is precisely that, without a sufficient knowledge and understanding of constitutional law, "judges" selected among the whole population would be inclined to merely assess the desirability of laws they would review, based on their political preferences. We believe that there is a place for that kind of citizen review, but it is not obvious that a constitutional court is the forum to do so.[29] To the extent that a constitutional court is judged desirable, we should maximize the chance that judges act based on judicial reasons, and we would not maximize that chance with "citizen" judges.

This is also a matter of *legitimacy*, as the quality of courts' legal reasoning, in addition to their independence, also contributes to their legitimacy (Sanders and von Danwitz 2018: 808). This quality should not be understood in political terms – whether decisions are aligned with the majority's preferences – but in legal terms: judicial decisions must provide transparent reasons, adequately consider the arguments raised by the parties, be coherent with

[27] By legal realists we refer generally speaking to those legal scholars emphasizing that the law and its content is determined foremostly by what judges do about disputes. This strand is, of course, varied. Some classic references here are Holmes (1920) and Lewellyn (1930), Karl Lewellyn (1930).

[28] Our emphasis in both quotations.

[29] Although one could also imagine constitutional juries, randomly selected from the whole population, to correct for the judges' biases and habitus. For an argument in favour of the use of constitutional juries, see Spector (2009) and Ghosh (2010). In this article, however, we assume that some minimal qualifications are required to interpret the law (though not to make it).

the existing case law and respect the known methods of statutory interpretation (Sanders and von Danwitz 2018: 808).

This being said, there is a range of conceivable options between enfranchising all adult citizens or only a small set of constitutional experts – including enfranchising all of those who have some degree in law, or all of those who have been admitted to the state bar (as in Bunting 2006). Our argument against universal enfranchisement certainly weakens as the threshold of qualification raises. We are open to quite inclusive interpretations of the required competencies to be a good judge – an issue we do not have the space to deal with in this article. Our modest point here, is that *some degree of certification* seems necessary for the quality of the judicial branch and the legitimacy it derives from it.

Hidden biases again

One might nonetheless attack certification by showing that it leads to a homogenization of selected judges: the pool of those likely to be certified are usually of similar demographic groups, as mentioned earlier. This is not specific to certification, of course. Nomination clearly suffers from these problems too. (See, for example, Segal and Spaeth 2002: 183). But this is little consolation. Certification does not by itself seem to offer better prospects of social diversity, as it depends on the background conditions determining what the pool of candidates examined will look like in terms of social diversity. The examination, then, could simply reproduce the biases implicit in those background conditions. Moreover, it is implausible to have an unbiased test, that would not give an advantage to some categories of people, given the distribution of the required skills in the larger population.

What is more, there is no empirical evidence that certification removes politics from the selection of judges and produced judges of "demonstrably higher quality" (Dubois 1986: 33; Webster 1995: 38). It might be preferable in theory, but things are different in reality — informal practices bring politics back into the selection (Bunting 2006: 192).

Again, we do not deny these issues. We simply believe that they are not fatal to the proposal. Because the aim of combining certification and random selection is not to obtain a statistically representative sample of the population, but to strike a right balance between the need for expertise and the need for independence, the remaining risks of biases are worth paying. They are part of the trade-off. And they do not worry us too much because, as we said, there is also a place for a popular assembly aiming at a more accurate statistical representation of society's diversity (yet with different missions than the ones entrusted to judges).[30] Furthermore, provided that the certification process leads to a large and relatively diversified pool of eligible candidates (which should be a goal when designing it), the chances of having members of minority groups serving in the constitutional court is likely to be higher with the method we advocate than with elections or nomination, thus reducing some selection biases.

[30] A randomly selected legislative chamber would likely not be perfectly representative of the people, but certainly more so than an elected one. One reason is that the number of people selected will likely be too low (between 80 and 500 in existing legislative chambers). Another is that several categories of the population are more likely to refuse to participate. Yet the combination of random selection with some quotas can partly compensate for this. See Vandamme and Verret-Hamelin 2017: 11-13.

Conclusion

We have argued in favor of selecting constitutional, federal or supreme judges through a two-stage process:

- Pre-selection of the eligible candidates through certification, i.e. a selection of the candidates having the right (legal) qualifications.
- Random selection among the eligible candidates.

The first stage aims at guaranteeing competence, while the second aims at maximizing political independence. The aim is to maximize the judges' incentives to make decisions based on legal rather than political motivation. Hence, we argued, it is preferable to conceive judicial selection methods differently and build the legitimacy of the judiciary at the constitutional level on other sources than electoral or political accountability; it is preferable to clearly separate it from other powers by maximizing its independence.

We have examined arguments against random selection and against certification. None of these seemed fatal to the proposal. Nevertheless, their careful examination led us to consider few additional aspects that should be observed when designing the selection method in practice:

- Accountability mechanisms should be imagined in order to keep the possibility to sanction judges breaching their duties or abusing their competences, while paying attention to the risks of political instrumentalization.
- The random selection process should be supervised by a balanced board, composed of representatives of diverse parties and possibly ordinary citizens.
- More attention should be paid to the detail of the certification process in order to minimize biases against some social categories and hidden politics. In order to minimize the risks of biases, the certification process should track sufficient (rather than maximal) qualification, allowing for a diversified pool of candidates for random selection.[31]
- Because the certification process will inevitably give an elitist character to the constitutional court, the need for a popular assembly of ordinary citizens selected exclusively by lot and reviewing legislation might appear even more important.

The arguments provided here are admittedly limited. As pointed out by Dubois (1986: 33), "the composition and quality of the bench [of judges] are undoubtedly affected by a host of factors other than the method of selection", such as the minimum formal qualifications, the length of mandate, the competitiveness of judicial salaries and pension

[31] We acknowledge that the relative impact of certification and sortition hinges on the proportion of certified candidates and the actual number of selected judges. We remain silent as to what the precise proportion should be as numbers will most likely vary in different institutional contexts. Yet for reasons stated above, higher numbers may be preferable. And with higher numbers, other options fostering diversity could be imagined, such as frequent rotation of judges or even stratified sampling.

plans,[32] or the "availability of mechanisms of judicial discipline". What this article has provided is a qualified normative assessment of a selection method compared with its alternatives. The resulting arguments should then feed a larger normative reflection on the method that will seem the most appropriate in different contexts, considering all these other factors.

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References

Arato, A. (2019). Populism, Constitutional Courts, and Civil Society. In Landfried, C. (ed.). *Judicial Power: How Constitutional Courts Affect Political Transformations*. Cambridge: Cambridge University Press (318-341).

Bello Hutt, D. (2017). Against Judicial Supremacy in Constitutional Interpretation. *Revus: Journal for Constitutional Theory and Philosophy of Law* 31: 7-28.

— (2018a). Constitutional Interpretation and Institutional Perspectives: A Deliberative Proposal. *Canadian Journal of Law and Jurisprudence* XXXI(2): 235-255.

— (2018b). Measuring Popular and Judicial Deliberation: A Critical Comparison. *International Journal of Constitutional Law (Icon)* 16(4): 1121-1147.

Biermé, M. (2019). Pourquoi les nominations à la Cour constitutionnelle font polémique. *Le Soir*, 23 September, https://plus.lesoir.be/249234/article/2019-09-23/pourquoi-les-nominations-la-cour-constitutionnelle-font-polemique

Bunting, W. (2006). Election-By-Lot as a Judicial Selection Mechanism. *NYU Journal of Law & Liberty* 2: 166-207.

Cappelletti, M. (1983). "Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility. *The American Journal of Comparative Law* 31(1): 1-62.

Courant, D. (2018). Penser le tirage au sort. Modes de sélection, cadres délibératifs et principes démocratiques. In Chollet, A. and A. Fontaine (eds.). *Expériences du tirage au sort en Suisse et en Europe: un état des lieux*. Berne: Schriftenreihe der Bibliothek am Guisanplatz (257-282).

— (2019). Sortition and Democratic Principles: A Comparative Analysis. In Gastil, J. and E. Olin Wright (eds.). *Legislature by Lot: Transformative Designs for Deliberative Governance*. London: Verso (229-248).

[32] Habel et al (2015), for instance, conducted research on the working conditions of US federal district court judges who seemed to face comparatively low salaries in contrast to those in peer professions. They found that "salary is an important determinant of both the quality and candidates nominated and those confirmed to the federal bench". Research in other contexts is consistent with those findings. See, for example, Dimitrova-Grazl et al. (2012).

Dahl, R. (1967). *Pluralist Democracy in the United States: Conflict and Consent.* Chicago: Rand McNally.

Davidow, R. P. (1981). Judicial Selection: The Search for Quality and Representativeness. *Case Western Reserve University Law Review* 31(3): 409-464.

Dimino, M. R. (2005). The Worst Way of Selecting Judges-Except All the Others that Have Been Tried. *Northern Kentucky Law Review* 32: 267-304.

Dimitrova-Grajzl, V., P. Grajzl, K. Zajc and J. Sustersic (2012). Judicial Incentives and Performance at Lower Courts: Evidence from Slovenian Judge-Level Data. *Review of Law & Economics* 8(1): 215-252.

Dowlen, O. (2009). Sorting out Sortition: A Perspective on the Random Selection of Political Officers. *Political Studies* 57(2): 298-315.

Dubois, P. L. (1986). Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections. *Southwestern Law Journal* 40: 31-52.

Doherty, K. and R. Pevnick (2013). Are There Good Procedural Objections to Judicial Review? *The Journal of Politics* 76(1): 1-12.

Elster, J. (1989). *Solomonic judgements: Studies in the limitation of rationality*. Cambridge: Cambridge University Press.

— (1998). Deliberation and Constitution Making. In Elster, J. (ed.). *Deliberative Democracy* Cambridge: Cambridge University Press (97-122).

Ely, J. (1980). *Democracy and Distrust. A Theory of Judicial Review.* Cambridge, Massachusetts: Harvard University Press.

Fisher, L. (1988). *Constitutional Dialogues. Interpretation as Political Process.* Princeton: Princeton University Press.

Fiss, O. (1993). Perspective: The Limits of Judicial Independence. *University of Miami Inter-American Law Review* 25(1): 57-76.

Gesley, J. (2016). How Judges Are Selected in Germany. *Library of Congress Blog*, https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/

Glick, H. R. and C. F. Emmert (1986). Selection Systems and Judicial Characteristics: The Recruitment State Supreme Court Judges. *Judicature* 70(4): 228-235.

Ghosh, E. (2010). Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries. *Oxford Journal of Legal Studies* 30(2): 327-359.

Griffith, J. A. (1997). *The Politics of the Judiciary.* London: Fontana Press.

Grimm, D. (2019). What Exactly is Political About Constitutional Adjudication? In Lafried, C. (ed.). *Judicial Power: How Constitutional Courts Affect Political Transformations*. Cambridge: Cambridge University Press (307-317).

Habel, P., D. Bennet, S. Gleason, and S. Comparato (2015). The Implications of Salary for the Quality of Nominations to the Federal District Courts, 1964–2012. *Justice System Journal* 36(4): 323-340.

Hans, V. P. (2008). Jury Systems around the World. *Annual Review of Law and Social Science* 4*:* 275-297.

Hart, H. (1983). American Jurisprudence Through English Eyes: the Nightmare and the Noble Dream. In Hart, H. *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press (123-144).

Hirshl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.

Holmes, O. W. (1920). The Path of Law. In *Collected Legal Papers*. New York: The Lawbook Exchange (167-202).

Kornhauser, L. (1995). Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System. *Southern California Law Review* 68: 1605-1629.

Kramer, L. (2004). Popular Constitutionalism circa 2004. *California Law Review* 92: 959-1012.

Llewellyn, K. (2008). *The Bramble Bush: The Classic Lectures on the Law and Law School.* Oxford: Oxford University Press.

López-Guerra, C. (2011). The Enfranchisement Lottery. *Politics, Philosophy & Economics* 10(2): 211-233.

Manin, B. (1995). *Principes du gouvernement représentatif*. Paris: Flammarion.

Martin, A., K. Quinn, T. Ruger and P. Kim (2004). Competing Approaches to Predicting Supreme Court Decision Making. *Perspectives on Politics* 2(4): 761-767.

Mansbridge, J. (2009). A 'Selection Model' of Political Representation. *The Journal of Political Philosophy* 17(4): 369-398.

Mellina, M. (2019). Tirage au sort et associations étudiantes : une expérience démocratique à l'Université de Lausanne? *Participations* 23(1): 147-170.

— (2020). The Use of Sortition in the Helvetic Republic: The Decline of Chance. In Lopez-Rabatel L. and Y. Sintomer (eds.). *Sortition and Democracy*. Exeter: Imprint Academics.

— (forthcoming). *Le sort ou la raison ! La disparition du tirage au sort en Suisse et le triomphe de la démocratie représentative (fin 18^{e} début 19^{e})*. Doctoral thesis. Lausanne: University of Lausanne.

Reddick, M. (2001). Merit Selection: A Review of the Social Scientific Literature. *Dickinson Law Review* 106: 729.

Rosanvallon, P. (2008). *La légitimité démocratique. Impartialité, réflexivité, proximité*. Paris: Seuil.

— (2015). *Le bon gouvernement*. Paris: Seuil.

Russo, A. (2019). Des juges tirés au sort : réalité ou illusion démocratique ? *Justice - Justiz – Giustizia* 2019/2.

Sanders, A. and L. von Danwitz (2018). Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy. *German Law Journal* 19(4): 769-816.

Segal, J. A. and H. J. Spaeth (2002). *The Supreme Court and the Attitudinal Model Revisited.* Cambridge: Cambridge University Press.

Schwartzberg, M. (2014). Democracy, Judgment, and Juries. In Elster, J. and S. Novak (eds.). *Majority Decisions: Principles and Practices*. Cambridge: Cambridge University Press.

Serra, R. (2013). La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de consejo más integrador e independiente. *Teoría y racionalidad constitucional* 31: 299-321.

Shamir, B. (1994). Ideological Position, Leaders' Charisma, and Voting Preferences: Personal vs. Partisan Elections. *Political Behavior* 16: 265-287.

Sintomer, Y. (2011). *Petite histoire de l'expérimentation démocratique. Tirage au sort et politique d'Athènes à nos jours*. Paris: La Découverte.

Spector, H. (2009). The Right to a Constitutional Jury. *Legisprudence* 3(1): 111-123.

Tulkens, F. (1995). La question du jury : enjeux d'une controverse. Approche historique et critique. In *Quel avenir pour le jury populaire en Belgique ?* Brussels: Bruylant.

Vandamme, P. E. and A. Verret-Hamelin (2017). A Randomly Selected Chamber: Promises and Challenges. *Journal of Public Deliberation*, 13(1).

Vidmar, N. (2000). A Historical and Comparative Perspective on the Common Law Jury. In Vidmar, N. (ed.). *World Jury Systems*. Oxford: Oxford University Press (1-52).

Vogler, R. (2001). The International Development of the Jury: The Role of the British Empire. *Revue internationale de droit pénal* 72(1): 525-550.

Webster, P. D. (1995). Selection and Retention of Judges: Is there one Best Method. *Florida State University Law Review* 23(1): 1-42.

Judicial Cases

Gregory v. Ashcroft, 501 US 452 (Supreme Court of the United States June 20, 1991).

R (Miller) v Secretary of State for Exiting the European Union, UKSC 5 (Supreme Court of the United Kingdom January 24, 2017).

R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland, UKSC 41 (Supreme Court of the United Kingdom September 17-19, 2019).

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Appendix: The Swiss Justice Initiative

"The Constitution is amended as follows:

Art. 145 Term of office

1 The members of the National Council and the Federal Council as well as the Federal Chancellor shall be elected for four years. The term of office of judges at the Federal Supreme Court shall end five years after they have reached ordinary retirement age.

2 The Federal Assembly sitting as a Council meeting may, on the proposal of the Federal Council, remove a judge from the Federal Supreme Court by a majority of the votes cast if the judge
a. has seriously violated his or her duties of office, or
b. has permanently lost the ability to perform his or her duties.

Art. 168, para. 1

1 The Federal Assembly shall elect the members of the Federal Council, the Federal Chancellor and the General.

Art. 188a Designation of judges to the Federal Supreme Court

1 The judges of the Federal Supreme Court shall be selected by lot. This shall be organised in such a way that the official languages are equitably represented in the Federal Supreme Court.

2 Admission to the random selection shall be governed exclusively by objective criteria of professional and personal suitability to serve as a judge of the Federal Supreme Court.

3 A specialised committee shall decide on admission to the random selection. The members of the committee shall be appointed by the Federal Council for a single term of office of 12 years. They shall be independent of the authorities and political organisations in the exercise of their activity.

Art. 197 No. 12
12. Transitional provision to Articles 145 (Term of office), 168(1) and 188a (Designation of judges to the Federal Supreme Court)

Ordinary judges at the Federal Supreme Court who are in office at the entry into force of Articles 145, 168 (1) and 188a may remain in office until the end of the year in which they reach the age of 68."

Source: https://www.justiz-initiative.ch/fr/initiative/texte-de-linitiative.html (personal translation)