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## APPOINTING JUDGES THE EUROPEAN WAY

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### **Cover Page Footnote**

Mary L. Volcansek is Dean of Humanities and Social Sciences and Professor of Political Science at Texas Christian University (“TCU”) in Fort Worth, Texas. Prior to coming to TCU, she taught at Florida International University in Miami, Florida and also served as Associate Dean of Arts and Sciences, Acting Assistant Vice President for Academic Affairs, and Chair of Political Science. She has written or co-authored five monographs, the most recent of which is *Constitutional Politics in Italy: The Constitutional Court*. She has, in addition to dozens of articles and book chapters, edited or co-edited four volumes. The most recent of these is *Courts Crossing Borders: Blurring the Lines of Sovereignty*, with John F. Stack, Jr.

## APPOINTING JUDGES THE EUROPEAN WAY

Mary L. Volcansek\*

### I. INTRODUCTION

American politicians deride an undefined “judicial activism,” but political scientists study a more precise phenomenon that reflects the growing expansion of judicial power, the “judicialization of politics.”<sup>1</sup> Judicialization occurs in either of two fashions: the judiciary expands its power into new arenas, at the expense of politicians and administrators, or progressively more political activities outside the judicial realm assume judicial-like qualities.<sup>2</sup> Either strand of judicialization conflicts with notions that courts and judges should be apolitical, but as Hans Kelsen pointed out in 1926, judges can never simply declare the law or enunciate the legislators’ will; every judicial decision is a choice among competing values.<sup>3</sup> Judges exercise political power not just in the annulment of a legislative act, but also in every courtroom where a criminal case is heard, a divorce granted, a piece of property seized, custody awarded, a written treatise protected, or damages ordered. In every case some societal value is favored over another, and the essence of politics consists in authoritatively allocating values for society.<sup>4</sup>

Who are these judges and how did they attain their powerful positions? That question is asked, not only in the United States, but also in democracies around the world. To fully understand the process for selecting judges, one needs to look beyond the simple act of appointment and consider a larger phenomenon that is referred

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1. Torbjorn Vallinder, *When the Courts Go Marching In*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 1, 13 (C. Neal Tate & Torbjorn Vallinder eds., 1995).

2. *Id.*

3. HANS KELSEN, *THE GENERAL THEORY OF LAW AND THE STATE* 153-54 (Transaction Publishers 2006) (1949).

4. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 350 (1965).

to by political scientists as recruitment. Recruitment flows in three stages: certification, selection, and assignment.

The first phase, certification, derives from a person's status in the structure of political opportunity, his opportunity costs, and political socialization. The second phase, selection, involves the interaction among aspirants, candidates, sponsors, and the selecting body. The final phase, role assignment, chooses the candidate and legitimizes his assumption of the office.<sup>5</sup>

The process operates like a funnel; more and more people are excluded from consideration at each stage until one is named. Thus, judicial selection encompasses more than just the point of selection and involves consideration of who was able to meet the minimum eligibility requirements and ultimately win out over others in competition. Obstacles to achieving the legal degree, obtaining the right experiences, or meeting the best political power brokers are all elements of judicial recruitment, as well as how the final selection is made. If one falters at any of the steps preceding the final point of selection, there is no possibility of obtaining the office.

The many configurations of judicial selection systems in the United States and elsewhere all aim to put the best people in the courtroom, but how do we know who would make the "best" judge? Characteristics that most would name are "personal integrity, intelligence, legal ability and judicial temperament,"<sup>6</sup> but all are difficult to recognize and even harder to measure and compare. Hence, a variety of mechanisms have been developed in the quest to find a way to recruit and appoint the "best" judges.<sup>7</sup>

Different goals drive various selection systems. All seek to name meritorious judges or, at the very least, legally competent and honest ones. The decision as to whether the meritorious judges should be accountable or independent determines, therefore, the choice of selection method, and neither value compromises the quest for meritorious judges, at least theoretically. Of course, recognizing meritorious judges when we see them poses the same dilemma as attempting to find and define the best judges.

The American states have devised a variety of mechanisms that attempt to achieve all three goals, even though reconciling inde-

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5. LESTER G. SELIGMAN ET AL., PATTERNS OF RECRUITMENT 14 (1974).

6. Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in THE ANALYSIS OF JUDICIAL REFORM 79, 80 (Philip L. DuBois ed., 1982).

7. *Id.*

pendence with accountability may be akin to squaring a circle. Europeans seem to know which value trumps the other, and that value is judicial independence. Even as a new mechanism for appointing judges in England and Wales was implemented in 2006,<sup>8</sup> the Lord Chancellor spoke of his commitment to “the principle of judicial independence” and noted that “the confidence of both the public and legal profession in an independent judiciary [is] essential.”<sup>9</sup> The preference for independence over accountability assumes that if the right people are named to the bench, then accountability should not be a concern. Indeed, accountability mechanisms can undermine genuine independence, because judges should be able to “decide cases impartially as between the parties—without being affected by ‘fear or favour.’”<sup>10</sup> Moreover, should judges fail in some egregious manner to perform their duties as expected, all systems include some mechanism for disciplining or removing the few errant jurists.<sup>11</sup>

Judicial independence and judicial impartiality are, in some ways, flip sides of the same coin; neither can survive without the other. The twin concepts have been defined as having “some degree of freedom from one or more competing branches of government or from the centers of private power.”<sup>12</sup> The more specific components of judicial independence involve the belief that judges can decide on their own, even in conflict with what others, political or judicial, may wish, particularly if a potential for retribution, either personally or institutionally, exists.<sup>13</sup> “Judicial independence is not a simple absolute, either present or absent.”<sup>14</sup> Between the poles of total insularity and significant bias and interference lie an almost infinite number of points. Even so, “the chief characteristic distinguishing the courts from the political institutions is judicial

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8. Constitutional Reform Act, 2005, c. 4 (Eng.), available at <http://www.opsi.gov.uk/acts/en2005/2005en04.htm> (last visited Oct. 11, 2006).

9. Dep’t for Constitutional Affairs, Judicial Appointments in England and Wales: Policies and Procedures, [http://www.dca.gov.uk/judicial/appointments/japp\\_ch1.htm](http://www.dca.gov.uk/judicial/appointments/japp_ch1.htm) (last visited Oct. 11, 2006).

10. Kate Malleson, *Introduction to APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 3, 6 (Kate Malleson & Peter H. Russell eds., 2006).

11. See MARY L. VOLCANSEK ET AL., *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* 120-24 (1996) [hereinafter VOLCANSEK, *JUDICIAL MISCONDUCT*].

12. John R. Schmidhauser, *Introduction: The Impact of Political Change upon Law, Courts and Judicial Elites*, 13 INT’L POL. SCI. REV. 223, 231 (1992).

13. THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* 144 (1970).

14. VOLCANSEK, *JUDICIAL MISCONDUCT*, *supra* note 11, at 9.

independence: independence from government and from political leadership, independence from political parties and the latest political fashion, independence from popular feelings.”<sup>15</sup>

Judicial accountability implies the converse. Indeed, a basic tenet of democratic theory holds that “rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives.”<sup>16</sup> If judicial officers make political decisions and are, as the argument goes, counted among the rulers, they should not be independent from government, from political fashions, or from popular sentiments. Judges’ professional training and attitudes require, however, that they hear “every argument, however curious, and to balance different arguments against each other,”<sup>17</sup> and that cannot happen if a judge weighs the potential political consequences of a decision. Furthermore, democracy can only work as it should if independent judges can act to protect against distortions of democratic processes.<sup>18</sup>

Looking abroad for examples to inform the American legal system is out of fashion, and that holds particularly true for foreign legal artifacts. The reluctance, even of scholars, to tackle the daunting task of exploring foreign legal systems has been explained by the suggestion that “legal systems and courts may be the most *system specific*”<sup>19</sup> of any political institutions, making achievement of desired levels of generalization difficult. Another explanation may be the rather enduring insistence on American exceptionalism, that notion that the United States is pervasively distinct and certainly exceptional when compared to other nations.<sup>20</sup> Interestingly, however, the United States liberally borrowed and modified many British institutions, most notably the system of appointing judges for life at the federal level. The notion of service at the king’s pleasure or, as we adapted it, for “good behavior,” was the sole model for judicial appointment until the 1830s when Jacksonian democracy ushered in an elective process for naming judges in

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15. TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 250 (2003).

16. Phillippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, in THE GLOBAL RESURGENCE OF DEMOCRACY 39, 40 (Larry Diamond & Marc F. Plattner eds., 1993).

17. KOOPMANS, *supra* note 15, at 94.

18. *Id.* at 95.

19. GREGORY S. MAHLER, COMPARATIVE POLITICS: AN INSTITUTIONAL AND CROSS-NATIONAL APPROACH 150 (1992).

20. See CHARLES LOCKHART, THE ROOTS OF AMERICAN EXCEPTIONALISM: INSTITUTIONS, CULTURE AND POLICIES 2-5 (2003).

some states.<sup>21</sup> Despite the disinclination to seek out alternative modes for naming judges as employed in other places, sometimes taking a comparative view helps us to see our own system more clearly or, as philosophers have long taught us, “knowledge of the self is gained through knowledge of others.”<sup>22</sup>

Indeed, other nations have frequently looked to the American system for proto-typical institutions, and the American invention of judicial review has been imitated around the world, particularly in countries with a federal form of government.<sup>23</sup> The American systems for selecting judges, with the notable exception of the elective one, have served as examples, both positive and negative, to other parts of the world, particularly in the post-World War II era.<sup>24</sup> Most recently, the Judicial Appointments Commission for naming judges to courts in England and Wales that came into force in April 2006, looks remarkably similar to the merit selection processes used in some American states.<sup>25</sup> This Article looks at methods of judicial selection in Europe as a way to contrast and perhaps better understand and improve the systems of judicial selection used in the United States.

## II. JUDICIAL SELECTION IN EUROPE

The selection of judges clearly marks the point where politics and courts most visibly intersect. Those writing constitutions outside of the United States have recognized that fact. When the Italian Constituent Assembly met in 1946 to write the post-Fascist constitution, it permitted selection of judges for the Constitutional Court to be political, positing that political appointment would be balanced by fixed term limits.<sup>26</sup> “[Fixed term limits are] not due to

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21. MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 75-76 (1988) [hereinafter VOLCANSEK & LAFON, JUDICIAL SELECTION].

22. MATTEI DOGAN & DOMINIQUE PELASSY, HOW TO COMPARE NATIONS: STRATEGIES IN COMPARATIVE POLITICS 5 (1990).

23. HENRY J. ABRAHAM, THE JUDICIAL PROCESS 251 (1962).

24. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 208 n.6 (2003).

25. Constitutional Reform Act, 2005, c. 4, §§ 25-27 (Eng.), available at <http://www.opsi.gov.uk/acts/en2005/2005en04.htm> (last visited Oct. 11, 2006).

26. MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY 15, 21 (2000) [hereinafter VOLCANSEK, CONSTITUTIONAL POLITICS] (noting that political influence on judges in Italy is apparent, however, appointments to the Italian Constitutional Court are for a single, non-renewable term); John Ferejohn & Pasquale Pasquino, *Comparative Avenues in Constitutional Law: Constitutional Structures & Institutional Designs: Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672, 1676-77 (2004) (noting that Hans Kelsen, the first Chief Justice and architect of

a rejection in [Germany, Italy, and Spain] of the concept of judicial independence, but rather to the . . . belief that fixed terms . . . grant adequate independence while life-tenure would promote irresponsibility, by propitiating that an individual's constitutional views become engrafted for too long unto the basic document."<sup>27</sup> Similarly, the Portuguese voiced concerns for balancing the political ideologies of the judges who would sit on the Constitutional Tribunal when revising their constitution in 1982.<sup>28</sup>

Continental Europe devised three models for naming judges: civil service, shared appointment, and shared appointment with partisan quotas. In many of these nations, there are two or even more types of courts, each with a different mode of appointment. For example, Italy, France, and Germany all use a civil service model for the ordinary and administrative courts, but use shared appointments with political quotas for the constitutional courts.<sup>29</sup> The civil service model and the much later constitutional ones that are separated from the judiciary can both be traced to Napoleonic France, but were subsequently adopted and adapted across much of the continent.<sup>30</sup> To comprehend the selection mechanisms that are used, one must first understand the basic political foundations that led to the creation of each system.

Montesquieu's concept of separation of powers, elaborated in *The Spirit of the Laws*, referred to judges as "the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."<sup>31</sup> Although this has been generally interpreted as a call for a docile and malleable judiciary, in actuality the very notion of separation of powers was designed to

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the Austrian Court, influenced the drafters of the Italian Constitution when they created the Italian Constitutional Court); see also Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 821 (2006) ("[E]very other major democratic nation that we know of—all of which drafted their respective constitutions or otherwise established their supreme constitutional courts after 1789—has chosen not to follow the American model of guaranteeing life tenure to justices equivalent to those on our highest court.").

27. Jose Julian Alvarez Gonzalez, *Another Look at the Discretionary Constitution*, 71 REV. JUR. U.P.R. 1, 21 (2002).

28. ANTONIO DE ARAUJO, O TRIBUNAL CONSTITUCIONAL (1989-1996) 15 (1997).

29. BECKER, *supra* note 13, at 88; YVES MENY & ANDREW KNAPP, GOVERNMENT AND POLITICS IN WESTERN EUROPE 320-25 (3d ed. 1998); VOLCANSEK & LAFON, JUDICIAL SELECTION, *supra* note 21, at 11.

30. VOLCANSEK & LAFON, JUDICIAL SELECTION, *supra* note 21, at 99; VOLCANSEK, JUDICIAL MISCONDUCT, *supra* note 11, at 20.

31. CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Prometheus Books 2002) (1748).



protect the judicial corps from an overbearing executive.<sup>32</sup> The idea of a judiciary that can only serve as the “mouth of the law”<sup>33</sup> would logically lead to the evolution of a judiciary that could not meddle in the affairs of the law-making bodies. This view was institutionalized in France in 1790 and remained in force through all of the later constitutions.<sup>34</sup> The Law of 16-24 August 1790 prohibited courts from interfering with legislation through American-style judicial review.<sup>35</sup> To overrule a legislative enactment would violate the principle of popular sovereignty, as reflected in the acts of a popularly elected parliament.<sup>36</sup> Declaring a law unconstitutional was even listed in the penal code as a “punishable offense.”<sup>37</sup> In 1799, Napoleon added another element to the equation to limit judicial interpretation—the codes that form the foundations of the civil law system.<sup>38</sup> The codes were intended to be comprehensive, such that judges need do no more than locate the proper provision and apply it to the case. Napoleon’s desire to systematize the law resulted in modern code law, namely: Civil Code (1804), Commercial Code (1807), Code of Civil Procedure (1807), Code of Criminal Instruction (1809), and Penal Code (1810).<sup>39</sup> French codes were borrowed and imitated in Belgium, the Netherlands, and Italy.<sup>40</sup>

These late eighteenth and early nineteenth century assumptions more or less formed the foundation of continental legal systems until after World War II. The single exception was the short-lived Austrian experiment with a constitutional court from 1920 until 1934.<sup>41</sup> That judicial body, the handiwork of law professor Hans Kelsen, would reemerge in the aftermath of the Nazi and Fascist experiences as a model for many continental judicial systems.<sup>42</sup> Kelsen rejected the U.S. model of decentralized judicial review, in which any court could declare a law in violation of the constitution,

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32. Martin Redish & Elizabeth Cisar, *If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 461 (1991).

33. VOLCANSEK & LAFON, JUDICIAL SELECTION, *supra* note 21, at 51.

34. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 24 (1992).

35. *Id.* at 25.

36. *Id.* at 26.

37. *Id.* at 25.

38. Jacqueline Lucienne Lafon, *France*, in THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 1, at 289, 290.

39. VOLCANSEK, JUDICIAL MISCONDUCT, *supra* note 11, at 8.

40. *Id.*

41. STONE, *supra* note 34, at 228.

42. *Id.*

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in favor of what he called “constitutional review” that could be exercised exclusively by the constitutional court, a body separate and distinct from the judiciary.<sup>43</sup> The 1920 Austrian Constitution was reintroduced at the conclusion of World War II and became the prototype for subsequent courts in Italy, Germany, Portugal, Spain, and the European Union.<sup>44</sup> A novel variation was also adopted in France.<sup>45</sup> The consequence for judicial selection is that many European judiciaries have one mechanism for appointing judges for constitutional courts and a quite distinct one for ordinary and administrative courts.

### A. Civil Service Model

The French Constitution of 1799 established the principle of executive appointment of judges for what would later be known as ordinary courts and separated them from the administrative courts that could review administrative decisions.<sup>46</sup> The French judiciary was reorganized into a clear hierarchy and, in the first decade of the nineteenth century, qualifications to hold judicial office were added.<sup>47</sup> In 1808, Napoleon created the position of auditor judges, a kind of probationary position where one gained judicial experience.<sup>48</sup> Then he required that, beginning in 1810, judges had to be licensed to practice law.<sup>49</sup> Although the former requirement was abandoned by 1830, the concept later reappeared.<sup>50</sup> Competitive examinations for judicial candidates were instituted in 1875, and one such examination was given each year.<sup>51</sup> That system was abandoned after 1878, because members of the government realized that they lost control of potential patronage if they could only appoint candidates scoring well on the examination without regard for their political persuasions.<sup>52</sup> Finally, in 1906, competitive examinations were reinstated and have remained the entry point for the French judiciary, although exceptions remain for lawyers with ten years of practice and professors of law.<sup>53</sup> The last innovation came

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43. KELSEN, *supra* note 3, at 157.

44. STONE, *supra* note 34, at 229-30.

45. *Id.* at 230.

46. VOLCANSEK & LAFON, JUDICIAL SELECTION, *supra* note 21, at 100, 108-11.

47. *Id.* at 109-10.

48. *Id.* at 108.

49. *Id.*

50. *Id.* at 110.

51. *Id.* at 109-10.

52. *Id.* at 110.

53. *Id.*

in 1958 when the *Centre national d'Etudes judiciaires* (National Center for Judicial Studies) was instituted to train future judges.<sup>54</sup>

The other Napoleonic principle governing judicial recruitment was that judges could not be removed from office.<sup>55</sup> That principle did not ensure judicial independence and was violated by politically motivated purges that accompanied regime changes in 1807, 1810, 1883, and 1941.<sup>56</sup> It did, however, serve to make the judiciary a form of civil service. When the concept of promotion through the ranks of the judicial hierarchy was fixed in 1927, the civil service nature of the judiciary was complete.<sup>57</sup>

This civil service model, begun under Napoleon, has been widely imitated across continental Europe and consciously demarcates a separation between law and politics.<sup>58</sup> Emphasis rests on pragmatic knowledge and non-interference in the political process.<sup>59</sup> Therefore, most civil law countries have systems in which the largest number of magistrates (a term used to connote both judges and prosecutors) are recruited directly from among young university graduates who score well on competitive examinations.<sup>60</sup> Most training is on-the-job, under the supervision of more senior judges.<sup>61</sup> The absence of any professional experience outside of the judiciary also allows for strong socialization within the judicial corps and a clear separation between the bench and the bar.<sup>62</sup> Two recent changes have, however, affected the process. More lateral entry into the judiciary by experienced lawyers now occurs and judicial schools, like the one begun in France in 1958, now train judges in Greece, Spain, and Portugal.<sup>63</sup> Spain's *Escuela Judicial Consejo General del Poder Judicial* (Judicial School of the General Council of the Judiciary) in Barcelona was created in 1994 and trains nearly 250 new judges each year and provides continuing education courses for sitting judges.<sup>64</sup> The school organizes competi-

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54. *Id.*

55. *Id.* at 115.

56. *Id.* at 110.

57. *Id.* at 111.

58. STONE, *supra* note 34, at 226.

59. *Id.* at 226-27.

60. CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 34 (2002).

61. *Id.* at 35.

62. *Id.*

63. *Id.*

64. European Judicial Training Network, *Spain: Escuela Judicial Consejo General del Poder Judicial (CEJAJ)*, [http://www.ejtn.net/www/en/html/nodes\\_main/4\\_1949\\_208/5\\_1585\\_25.htm](http://www.ejtn.net/www/en/html/nodes_main/4_1949_208/5_1585_25.htm) (last visited Oct. 11, 2006).

tive examinations for university law graduates and then trains them using the case method.<sup>65</sup> The Portuguese version similarly accepts students after completion of their university law training, and entry is competitive.<sup>66</sup> The school's curriculum includes initial theoretical training and a type of internship in either a prosecutorial or judicial setting.<sup>67</sup>

With some variations on the theme, the civil service model for appointing judges can be found in Austria, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, and Sweden.<sup>68</sup> Notably, it was not the choice for the post-Cold War democracies of central Europe.<sup>69</sup>

France was the birthplace of the civil service judicial system, and, though the foundations were laid in the nineteenth century, the system remains in place with only some minor modifications. The contemporary French ordinary courts continue to serve as passive bodies, where "[t]he entire culture is oriented to constrain the impact of the personality of the judge."<sup>70</sup> The present French Constitution, implemented in 1958, added a Superior Council of the Magistrature (*Conseil Supérieur de la Magistrature*), charged with discipline and promotion of judges.<sup>71</sup> In 1959, the first school for judges, the National Centre of Judicial Studies, renamed in 1970 as the National School for Magistrates, was established to train those who succeed on the competitive examination (people with five years of experience as legal practitioners or in the civil service are eligible as well) and are destined to become judges and magistrates.<sup>72</sup> The course of study lasts for thirty-one months, covers both theoretical and practical elements of judging, and culminates with an exit examination.<sup>73</sup> "Initial appointments are made on the basis of examination scores, those receiving the highest scores get-

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65. *Id.*

66. European Judicial Training Network, *Portugal: Centro de Estudos Judiciarios*, [http://www.ejtn.net/www/en/html/nodes\\_main/4\\_1949\\_208/5\\_1585\\_23.htm](http://www.ejtn.net/www/en/html/nodes_main/4_1949_208/5_1585_23.htm) (last visited Oct. 11, 2006).

67. *Id.*

68. LEGAL SYSTEMS OF THE WORLD 96, 555, 588, 604, 765, 1120, 1316-17, 1519, 1566 (Herbert M. Kirtzer ed., 2002); University of Ottawa, Legal Systems: Alphabetical Index of Legal Jurisdictions, <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-tableau.php> (last visited Oct. 11, 2006).

69. For example, it was not the choice for Slovakia, Slovenia, Poland, or Hungary. LEGAL SYSTEMS OF THE WORLD, *supra* note 68, at 675, 1310, 1458-59, 1465.

70. Doris Marie Provine & Antoine Garapon, *The Selection of Judges in France*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 10, at 176, 182.

71. *Id.* at 184-85.

72. *Id.* at 183-84.

73. *Id.* at 183.

ting first pick of the positions. Most of the graduates are appointed to a judgeship in the provinces at the lowest level.”<sup>74</sup> Advancement within the judiciary is based on seniority and merit, with actual promotions decided by either the Superior Council of the Magistrature for the higher courts and on the advice of the Council for the lower levels; in either case, the formal appointment is made by the Minister of Justice.<sup>75</sup>

Traditionally, French judges have not been held in high esteem by the public or political elites, so they formed a union to defend their rights. *Syndicat de la Magistrature* (Magistrates Union) actively works to protect judges and to preserve the professional values that dominate the system of appointment and discipline.<sup>76</sup> With the introduction of human rights law through the European Convention of Human Rights<sup>77</sup> and the empowerment of national judges through the European Union, French judges are gaining greater prestige, and “French public opinion is becoming somewhat more favourable towards the idea of litigation to achieve social ends.”<sup>78</sup>

Germany has a tightly structured system of legal education that serves as the first hurdle for prospective judges. A largely government-mandated law school curriculum, taking three and a half years, is followed by at least another two years of internship, if one passes the rigorous written and oral examinations at the conclusion of the initial curriculum.<sup>79</sup> The internship requires students to work in various government or judicial offices; the first assignment is selected for the student, but the longer, second assignment can be the student’s choice.<sup>80</sup> Then, there is a second written and oral state examination.<sup>81</sup> Only fifty percent of those beginning legal studies successfully complete the course and are able to enter a branch of the legal service, and only those passing the second state exam with high honors are eligible to apply to the judiciary.<sup>82</sup> Since Germany is a federal nation, entrance to the *land* or state

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74. *Id.*

75. Jacqueline Lucienne Lafon, *The Judicial Career in France: Theory and Practice under the Fifth Republic*, 75 JUDICATURE 97, 101 (1991).

76. *Id.* at 105-06.

77. See Provine & Garapon, *supra* note 70, at 179.

78. *Id.* at 186.

79. Donald P. Kommers, *Autonomy versus Accountability: The German Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 131, 143 (Peter H. Russell & David M. O’Brien, eds. 2001).

80. *Id.*

81. *Id.* at 143-44.

82. *Id.* at 144.

judiciaries is determined by the state ministry of justice.<sup>83</sup> Once selected, the new judges begin a three-year probationary period during which time they begin hearing cases, usually at the lowest court level.<sup>84</sup> Movement up the hierarchical ladder of the judiciary depends on merit, as determined by other, more senior judges and the state ministry of justice.<sup>85</sup> A parallel process occurs for courts on the federal level, but there are additional minimum age requirements.<sup>86</sup>

The Netherlands offers another variation on the civil service model for the judiciary.<sup>87</sup> The Dutch system allows for two potential routes into the judiciary after one secures a law degree.<sup>88</sup> The first begins with a six-year program of judicial studies after completion of the law degree.<sup>89</sup> That program includes a type of internship in various legal entities.<sup>90</sup> The other route involves working in a law firm for a minimum of six years before applying for a judgeship.<sup>91</sup> Applicants from either route take an examination to test legal knowledge and are also subjected to a psychological test and a psychological assessment.<sup>92</sup> They must submit letters of recommendation and be interviewed by delegates from the seventy-one person selection committee.<sup>93</sup> That committee is dominated by lawyers, but it also includes prosecutors, high-ranking government and university officials, and a few representatives of other professions.<sup>94</sup> The committee is self-perpetuating, such that new members to it are recommended by sitting members.<sup>95</sup> When the committee ranks candidates, it does so on six or seven criteria, only one of which relates to knowledge of the law; the remainder are measures of character.<sup>96</sup> The committee offers its recommendations to the minister of justice who makes the appointments.<sup>97</sup>

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83. *See id.*

84. *Id.* at 145.

85. *Id.*

86. *Id.* at 147.

87. *See* Leny E. deGroot-van Leeuwen, *Merit Selection and Diversity in the Dutch Judiciary*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 10, at 145, 150.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 150-51.

95. *Id.* at 151.

96. *See id.* at 150.

97. *Id.*

The Italian ordinary judiciary presents yet another version of the French civil service model. The post-World War II constitution provided for a Superior Council of the Magistrature to oversee discipline and promotions, but the extensive training that characterizes the German, Dutch, and French systems was absent.<sup>98</sup> Rather, upon completing one's law degree, a state competitive examination, both written and oral, served as the sole screening device for admission to the combined corps of judges and prosecutors.<sup>99</sup>

In Italy, several unions with strong political ideological tendencies represent magistrates and judges, and prosecutors do strike the protest changes in the legal or judicial system. The unions run slates of candidates for those members of the Superior Council of the Magistrature who are elected by judges.<sup>100</sup> Thus, the magistrates have opened themselves to the charge that they are politicized, but at least the political currents of the judges cross the ideological spectrum. In April of 2005, however, a new law governing the magistrature was enacted that separated the prosecutorial career from the judicial one, introduced a more realistic form of examination, and created an educational program for judges, including a compulsory continuing education component.<sup>101</sup> Previously, promotion through the ranks of the judiciary depended solely on seniority and positive evaluations from the Superior Council of the Magistrature.<sup>102</sup> The basic element that changed with the 2005 law was that highly competent judges could reach the higher levels more quickly.<sup>103</sup> Many of the arguments supporting the reform of the judiciary were drawn from the experiences and models of other European nations.

The virtues of the civil service model lie in its focus on training judges, protecting them from fickle political winds, and promoting the meritorious from within the judiciary. One is not a practicing lawyer one day and then, after an appointment or an election win, placed in a totally different role. The role confusion that results

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98. GUARNIERI & PEDERZOLI, *supra* note 60, at 40-42.

99. *Id.* at 40.

100. Mary L. Volcansek, *Judicial Selection in Italy: A Civil Service Model with Partisan Results*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 10, at 167 [hereinafter Volcansek, *Italian Judicial Selection*].

101. Patrizia Pederzoli, *The Reform of the Judiciary*, in ITALIAN POLITICS: QUO VADIS 153, 157-59 (Carlo Guarnieri & James L. Newell eds., 2005); *Ciampi Signs Judicial Reform into Law*, ITALY, July 27, 2005, <http://www.italymag.co.uk/2005/news-from-italy/current-affairs/ciampi-signs-judicial-reform-into-law/>.

102. See Pederzoli, *supra* note 101, at 159-60; Volcansek, *Italian Judicial Selection*, *supra* note 100, at 165-66.

103. Pederzoli, *supra* note 101, at 159-60.

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from being an advocate and then shifting to being an impartial arbiter ceases to be an obstacle. The system ensures, moreover, judicial independence and freedom from political interference, even though there exists a measure of influence by the ministries of justice in judicial selection in most countries.<sup>104</sup>

The civil service model, on the other hand, does not engender the level of prestige that judges in common law systems enjoy, and the judiciary lacks any base of legitimacy other than its commitment to the rule of law. Incompetent or corrupt judges are rarely removed from office.<sup>105</sup> The civil service model breeds a strong sense of internal loyalty among its members, but it also insulates judges from broader social and economic issues that may color the cases that they are called upon to decide. Though the civil service judges may be highly trained, they have little working knowledge of what running a legal practice on a daily basis requires and may have little sympathy for the lawyer who is juggling multiple cases and commitments.

### B. Shared Appointment

A shared appointment approach to naming judges is found, at least in the European context, where there are constitutional courts. Constitutional courts are modeled, as mentioned earlier, on the pre-World War II Austrian example, and their creation constituted a conscious rejection of the U.S. model.<sup>106</sup> These courts are separated from the ordinary and administrative judiciaries and are co-equal with the executive and legislative bodies. They exist solely to apply and interpret the constitution. Both Italy and West Germany first adopted constitutional courts in their post-war constitutions, and Spain and Portugal did likewise when they emerged from dictatorial regimes.<sup>107</sup> Luxembourg has recently adopted one,<sup>108</sup> as have the Czech Republic,<sup>109</sup> Slovakia,<sup>110</sup> Slovenia,<sup>111</sup> Lithuania,<sup>112</sup> Latvia,<sup>113</sup> and Hungary.<sup>114</sup> Cases do not reach the

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104. GUARNIERI & PEDERZOLI, *supra* note 60, at 43-45.

105. See VOLCANSEK, JUDICIAL MISCONDUCT, *supra* note 11, at 111.

106. See STONE, *supra* note 34, at 228.

107. See *id.* at 230-33 (noting that West Germany implemented a constitutional court in 1951); VOLCANSEK, CONSTITUTIONAL POLITICS, *supra* note 26, at 1 (noting that constitutional courts proliferated in post-war Europe (i.e. the Italian Constitutional Court implemented in 1958) and then later in Spain and Portugal).

108. LEGAL SYSTEMS OF THE WORLD, *supra* note 68, at 928.

109. *Id.* at 413.

110. *Id.* at 1458.

111. *Id.* at 1465.

112. *Id.* at 919.



European constitutional courts through an appellate process, as they do in the United States. Rather, they are referred, usually by judges hearing cases that raise issues of constitutional interpretation, to the constitutional bodies for a definitive interpretation that sometimes requires that a law or other official action be annulled if it is deemed to conflict with the interpretation of the constitutional court.<sup>115</sup> In some countries, a priori constitutional review allows that a law's validity can be determined by the constitutional body in advance of a concrete case challenging the application of the law.<sup>116</sup> This was the practice in France and Portugal, and for Spain as well until 1985.<sup>117</sup> Some constitutional courts, like the court in Germany, allow for a direct challenge of a law's constitutional application by any individual.<sup>118</sup> These challenges must involve direct infringement of specified rights, but "it is quite rare for a law in itself to cause such *direct* infringement."<sup>119</sup>

Constitutional court judges are typically named through a process of shared appointment. When judges on ordinary courts have a role in appointments, bridges are created between the ordinary courts and the constitutional court. For example, in Germany, eight of the sixteen constitutional jurists must be chosen from among judges on the highest courts, and in Italy, five of the fifteen constitutional jurists are appointed by the judges of the ordinary and administrative judiciary.<sup>120</sup> In a system of shared appointive authority, partisan politics may or may not play a role, though it usually does.

In Italy, for example, even those judges named by the ordinary judges tend to reflect the relative power of the various judicial unions.<sup>121</sup> Five others are named by Parliament in a joint sitting of the two houses and five are appointed by the President of the Republic, a largely ceremonial official who represents national unity.<sup>122</sup> Those named by Parliament and in practice by the President of the Republic were, for forty years, apportioned among the parties according to a negotiated formula.<sup>123</sup> Until 1994, that

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113. *Id.* at 855.

114. *Id.* at 673.

115. STONE, *supra* note 34, at 228-31.

116. *Id.* at 231.

117. *Id.*

118. MENY & KNAPP, *supra* note 29, at 331.

119. *Id.*

120. *Id.* at 331.

121. VOLCANSEK, CONSTITUTIONAL POLITICS, *supra* note 26, at 22-23.

122. *Id.* at 21-23.

123. *Id.* at 22.

formula allowed for two positions for the Christian Democrats, one each for the Socialist and Communist parties, and one to be rotated among the lay parties.<sup>124</sup> When the old Italian political party system collapsed in 1994, there was no agreed upon allocation, and nominations were decided by a vote of the two houses in a joint sitting.<sup>125</sup> The result was that a number of vacancies were not filled through 1995, but when they were finally filled, they tended to follow the general lines of the previous system.<sup>126</sup>

Judges on the German Constitutional Court are also selected through a shared appointment system with clear partisan quotas. The two houses of the German Parliament, the *Bundestag* and the *Bundesrat*, select the judges, but six of them must be selected from among judges sitting on the highest ordinary and administrative courts.<sup>127</sup> The German Constitutional Court is divided into two senates, each having different jurisdictions, and judges are appointed to a specific senate.<sup>128</sup> The directly elected *Bundestag* uses a judicial selection committee to make all of its appointments, whereas the *Bundesrat*, representing the states or *lander*, involves the entire chamber in electing judges.<sup>129</sup> A two-thirds majority vote is required for selection.<sup>130</sup> Because the two-thirds majority can lead to a stalemate, each of the two major parties have informally agreed to each get one-half of the judgeships in each senate.<sup>131</sup> The minor parties obtain their representation on the court through the allocation of the major party with whom they are in a coalition.<sup>132</sup> Thus, the Free Democratic Party and the Green Party usually “secure a seat from their larger coalition partner when they are in government.”<sup>133</sup> Since German Constitutional Court judges serve one non-renewable twelve-year term, when a judge retires “the party with ‘property rights’ over the seat can choose the re-

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124. *Id.* at 23.

125. *Id.*

126. *Id.*

127. Most continental countries have a system of ordinary and administrative courts, but Germany also has a system of financial courts, social courts, and labor courts. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 3, 9 (1997).

128. *Id.* at 8.

129. GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 83 (2005).

130. *Id.*

131. *Id.*

132. *Id.* at 83-85.

133. *Id.* at 84-85.

placement (subject to an informal norm against choosing extreme candidates).”<sup>134</sup>

Spain’s 1978 constitution, enacted as Spain emerged from a dictatorial regime, provided for a constitutional court (*Tribunal Constitucional*) of twelve members, with four judges elected by the lower house and four by the senate, with a three-fifths majority required in each.<sup>135</sup> Two are named by the prime minister and two by the governing body of the judiciary, the *Consejo General del Poder Judicial*.<sup>136</sup> Though the tribunal intends to be apolitical, “in practice, the system entails political patronage, usually agreed upon between the major parties.”<sup>137</sup>

Portugal’s 1982 constitution introduced a slight variation on the Spanish Constitution.<sup>138</sup> Ten of the thirteen judges on the *Tribunal Constitucional* are elected by a two-thirds majority of the members of parliament, *Assembleia da República*, and the remaining three are selected by the ten elected judges.<sup>139</sup> Some consider this to be a peculiar arrangement; perhaps for this reason there are those who think all members of the *Tribunal Constitucional* should be elected by parliament (*regra da cooptação*).<sup>140</sup> The jurists named by parliament have reflected an attempt by the two major parties to preserve a political equilibrium on the tribunal.<sup>141</sup>

Though the French Constitutional Council stands as a unique hybrid institution, created in 1958 to protect the executive from a potentially non-acquiescent parliament, it has evolved into the weapon of last resort for the parliamentary opposition.<sup>142</sup> It is not a court, per se, and could not be in light of the 1791 prohibition on a judge’s invalidating any law.<sup>143</sup> Therefore, the constitutional validity of a law can be judged in the Council in the abstract, divorced from any concrete fact pattern, *before* it is enacted into law.<sup>144</sup> Any law can be referred to the Council by the President of the Republic, the Prime Minister, the Presidents of the National Assembly or

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134. *Id.* at 83.

135. MICHAEL T. NEWTON & PETER J. DONAGHY, INSTITUTIONS OF MODERN SPAIN 26 (1997).

136. *Id.*

137. PAUL HEYWOOD, THE GOVERNMENT AND POLITICS OF SPAIN 106 (1995).

138. DE ARAUJO, *supra* note 28, at 24-25.

139. CONSTITUTION OF THE PORTUGUESE REPUBLIC title VI, art. 222 (7th Revision 2005); DE ARAUJO, *supra* note 28, at 14, 34, 46.

140. DE ARAUJO, *supra* note 28, at 34.

141. *Id.* at 47.

142. STONE, *supra* note 34, at 87.

143. *Id.* at 23.

144. *Id.* at 231.

the Senate, or by sixty senators or sixty deputies before it is promulgated into law.<sup>145</sup> Whereas other constitutional bodies struggle to demonstrate that they are legal rather than political institutions, the French Constitutional Council is overtly political, staffed by politicians for whom the primary criterion for appointment is partisan affiliation.<sup>146</sup> Three of the nine counselors are appointed by the President of the Republic (not a ceremonial figurehead), three by the President of the National Assembly, and three by the President of the Senate; in addition, all former presidents of the republic serve for life.<sup>147</sup> “Legal credentials or experience are not required, though so far, those nominated have had them.”<sup>148</sup>

To find an example where shared appointment does not carry at least a hint of partisan quotas, one must look to the supranational courts in Europe. The European Court of Justice (“ECJ”) governs all interpretation of the EU treaties and, through a referral process involving the courts in the member states, determines when there are conflicts between national laws and constitutions and the treaties.<sup>149</sup> The ECJ is composed of twenty-five judges, one for each of the member nations.<sup>150</sup> The European Economic Community Treaty provides that the judges shall “be appointed by common accord of the Governments of the Member States for a term of six years.”<sup>151</sup> Although there is no nationality requirement, “there is an unwritten rule that one judge will come from each member state.”<sup>152</sup> The judges are proposed by their nations of origin, and rarely are nations’ nominations disputed. Only those who are qualified to be named to the highest courts of their home nations can sit on the court.<sup>153</sup> The extent to which appointments are rotated among parties or reserved to the majority party reflects the appointing country’s political culture.<sup>154</sup> Therefore, appointments

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145. *Id.* at 57.

146. *Id.* at 50.

147. *Id.* at 232.

148. Provine & Garapon, *supra* note 70, at 182.

149. The treaties are superior to any national law or constitution, and conflicting national laws must give way to the European ones. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1141.

150. The Court of Justice of the European Communities, The Institution, <http://curia.europa.eu/en/instit/presentationfr/cje.htm> (last visited Oct. 11, 2006).

151. European Economic Community Treaty art. 167, Mar. 25, 1957, 298 U.N.T.S. 11, at 223.

152. RENAUD DEHOUSEE, *THE EUROPEAN COURT OF JUSTICE* 7 (1994).

153. *Id.* at 8.

154. *See id.* at 8, 12.

may carry some partisan overtones. Some feared that judges would have a bias toward their individual countries, but there has been no evidence of that happening.<sup>155</sup> Since the six-year term is renewable, however, if the member nation chooses to propose a judge for a second or succeeding term, there exists a potential for political pressure. In some instances, circumstances suggest that a given judge was not nominated for a subsequent term because of decisions of the court.<sup>156</sup> The judges are shielded to some extent, however, by the rule that all decisions are taken collegially.<sup>157</sup> No votes are recorded nor are there dissenting opinions, which makes the task of a country's attempting to control or monitor the work of a given judge impossible.<sup>158</sup> It is obvious, however, that nations wanted to preserve some potential measure of control because during negotiations for the Maastrich Treaty, members rejected a proposal from the European Parliament to lengthen judicial tenure to twelve-year non-renewable terms.<sup>159</sup>

The European Court of Human Rights ("ECHR"), which was created to enforce the European Convention on Human Rights in those countries that have ratified the treaty, recognized the right of individual petition and accepted compulsory jurisdiction.<sup>160</sup> The treaty provides that, "in time of war or other public emergency threatening the life of the nation," any country may derogate from the treaty obligations provided that measures adopted by the country do not violate obligations under international law.<sup>161</sup> During the "troubles" in Northern Ireland, for example, the U.K. used derogations to avoid the censure of the ECHR.<sup>162</sup>

The number of judges on the ECHR equals the number of nations who are members of the Council of Europe (currently forty-two), but they are, according to the convention, elected by the Consultative Assembly from a list submitted by the member nations.<sup>163</sup> Each country may nominate three people, two of whom must be its own nationals.<sup>164</sup> In reality, only those countries having

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155. *Id.* at 95.

156. *Id.* at 12.

157. *Id.* at 13.

158. *Id.*

159. *Id.* at 15.

160. *Id.* at 169.

161. European Convention on Human Rights art. 15, § 1, Nov. 4, 1956, 213 U.N.T.S. 222.

162. DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 54-55 (1997).

163. European Convention on Human Rights, *supra* note 161, arts. 20-22.

164. *Id.* art. 22, § 1.

a representative on the court whose term is expiring submit lists, and those lists are ranked. Normally, the Council recommends the first name on the list, and the Consultative Assembly goes through the formality of election.<sup>165</sup> The assembly has established a preliminary screening committee that reviews resumes and conducts interviews, but that appears to be an ineffective filter.<sup>166</sup> The judges on the ECHR do not preserve their anonymity in the decision-making process. Votes are recorded and dissenting opinions are common.<sup>167</sup> Judges serve for nine-year, renewable terms, but no instances of non-renewal for decisions rendered have been noted.<sup>168</sup>

The International Criminal Court (“ICC”), the newest of the supranational courts, has a jurisdiction much wider than Europe, though it is located in the Hague. This court’s jurisdiction extends only to four categories of crimes: genocide, crimes against humanity, war crimes, and aggression.<sup>169</sup> Its mode of judicial selection does not neatly fall into one of the three categories listed, but comes closest to the shared appointment model. The judge candidates self-nominate, and a body representing all of the signatory states elects from among them.<sup>170</sup> The sharing that occurs is sharing among nations. The first judges were named in February 2003, by the Assembly that represents all of the signatory nations.<sup>171</sup> Serving on the ICC requires a person to be “of high moral character, impartiality and integrity who possess[es] the qualifications required in their respective States for appointment to the highest judicial offices.”<sup>172</sup> Additionally, they must be fluent in either French or English, the working languages of the court.<sup>173</sup> Forty nominations were received in 2003 for the eighteen judicial posts, and more than one-third of those elected were women.<sup>174</sup> Candidates are chosen from two lists, one for criminal law expertise and the other for international law specialization; should one qualify

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165. JACKSON, *supra* note 162, at 12.

166. Ruth Mackenzie & Philippe Sands, *Judicial Selection for International Courts*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 10, at 213, 229.

167. JACKSON, *supra* note 162, at 20-26.

168. *Id.* at 13.

169. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 26 (2004).

170. *Id.* at 10-21, 177-80.

171. *Id.* at 20-21.

172. Rome Statute of the International Criminal Court art. 36, § 3(a), July 1, 2002, 2187 U.N.T.S. 90.

173. SCHABAS, *supra* note 169, at 177.

174. *Id.* at 20-21.

for both lists, the candidate chooses on which list to appear.<sup>175</sup> In the first election, ten were selected from the criminal law list and eight from the international one.<sup>176</sup> The judges serve for nine-year terms, and currently those are not renewable.<sup>177</sup>

### III. CONCLUSION

The American states seek to locate the “elusive balance between independence and accountability,”<sup>178</sup> while Europeans have come down firmly on the side of judicial independence. Questions remain for both European and American systems. In the European context, do the civil service, shared appointments, or shared appointments with partisan quota models ensure that judges individually and the judiciary collectively are insulated from external pressures? Conversely, does the election process utilized in some American states truly ensure accountability? Martin Shapiro argues that, in the most basic sense, a judge is independent if she has “not been bribed or was not in some other way a dependent of one of the parties,” but adds that a judge can never be fully independent because she depends on “those for whom she holds office.”<sup>179</sup> The civil service model comes the closest of any system to achieving independence, with its emphasis on the inability of government officials to remove judges and its thorough socialization of a judicial corps. Yet, the civil service model typically forfeits judicial prestige and cannot, as the Italian case teaches, eliminate political ideology from coloring a judge’s decision.

Independence of decision, though, stands as a defining trait of a judge. “The moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure,” wrote Henry Lummis, “that moment the judge ceases to exist.”<sup>180</sup> When issues of human rights must be reconciled with notions of popular sovereignty, judges exercise the prerogative of deciding between the two competing values. An independent, non-majoritarian institution can best check “the way political power is exercised in order to control its misuse and protect citizens’ free-

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175. *Id.* at 177.

176. *Id.* at 178.

177. Rome Statute of the International Criminal Court, *supra* note 172, art. 36, § 9; SCHABAS, *supra* note 169, at 179.

178. Malleon, *supra* note 10, at 6.

179. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 19-20 (1981).

180. HENRY LUMMIS, THE TRIAL JUDGE 10 (1937).

doms.”<sup>181</sup> The counter to that assertion posits that totally independent and unaccountable judges lack democratic legitimacy. But that argument assumes that all important decisions in a democracy must be made in a democratic fashion. Both democratic principles and the rule of law guide liberal democracies. By applying the rule of law, independent judges protect minorities, and “without such a protection, democracy cannot prosper.”<sup>182</sup> Moreover, independent judges constitute the democratic instrument that protects democratic processes from distortion.<sup>183</sup>

European constitutional courts, whose judges are named through shared appointments and a balance of partisan quotas, were created in recognition of the fact that politics and judicial decision-making may not be wholly divorced. “The dream of a Constitutional Court with no political links at all is certainly unrealistic,” according to Yves Meny and Andrew Knapp.<sup>184</sup> Therefore, constitutional courts are generally accepted to be simultaneously political and judicial bodies. Appointing bodies for judges have achieved a means of guaranteeing that the partisan biases are balanced. Through the use of a compromise on partisan quotas, the French went even further, eschewing any pretense of an impartial Constitutional Council and boldly and openly appointing politicians to it.<sup>185</sup>

The democratic legitimacy of European judges derives from the intimate connection between democracy and the rule of law. Legitimacy does not attach, in the public eye, to a single political institution, but rather to the system as a whole. Political legitimacy is most often defined as the “belief that the existing political institutions are the most appropriate ones for the society.”<sup>186</sup> Judges who are appointed or rise through a bureaucratic civil service apparatus may be an essentially undemocratic element, but they operate, nonetheless, in a democratic system, just not one that is “democratically controlled.”<sup>187</sup> Appointed judges do not derive their legitimacy directly from the electorate, but rather from the whole of the

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181. GUARNIERI & PEDERZOLI, *supra* note 60, at 10.

182. KOOPMANS, *supra* note 15, at 95.

183. *See id.* at 94-96.

184. MENY & KNAPP, *supra* note 29, at 333.

185. *Id.* at 328.

186. SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 64 (Anchor Books 1963) (1960).

187. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 188 (1989).

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political system and the necessity for guardians of the rule of law. European systems of appointing judges thus provide legitimacy while prioritizing judicial independence over accountability.

