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ARTICLE

Recruitment and appointment of judges and justices in Europe and the US

Law and legal culture

In this article Bovend'Eert compares the law and legal culture regarding the recruitment and appointment of judges and justices in European countries and the United States.

1. Introduction

There is a famous (and probably untrue) story about President Dwight D. Eisenhower, who was once interviewed by a journalist. The journalist asked a bold question, whether Eisenhower made any mistakes as a president. Eisenhower said: *"Yes I made two mistakes and both of them are sitting on the Supreme Court."* Eisenhower was referring to the appointment of Chief Justice Earl Warren and Justice William Brennan, who turned out to be more liberal than conservative. I think this might be a reassuring opening to this presentation. The President of the US, the executive, tries to influence the judiciary by appointing justices with corresponding political views. But judges choose their own path after being appointed. There is an old saying in the US in this respect: 'You shoot an arrow into a far-distant future, when you appoint a justice.'

The appointment process of federal judges and justices in the US seems to be, at first sight, a very political process. All federal judges are appointed, not elected. They are nominated by the President and must be confirmed by the US Senate through a majority vote. Following confirmation, the President finally makes the decision to commission the judges to their position for a life term (Article II US Constitution).

There is no formal method for the selection of candidates for judicial positions in the US. But in practice, there are a wide range of safeguards to promote the appointment of qualified judges and justices. In practice, (home state) members of the Senate play an important role in selecting candidates for their district courts and circuit courts by forming selection committees. Prominent lawyers, state or federal judges or law professors are selected. The Department of Justice then reviews the legal qualifications of the candidates. The American Bar Association (ABA) advises on the qualifications of candidates. And the Senate Judiciary Committee extensively examines the qualifications and background of candidates.

So the procedure for the appointment of federal judges in the US is in the hands of politicians, in accordance with the US Constitution. But in practice the procedure is far from a purely political one.

I would like to refer to a report from the Council of Europe working group GRECO (Group of States against Corruption) concerning the judicial system in the US. GRECO concludes in its evaluation report from 2017

that there is every reason to think that those who are appointed as federal judges and justices are all candidates of the highest integrity, of outstanding legal ability, and fully qualified for judicial office in every respect. GRECO emphasizes that there are additional strong safeguards for judicial independence, such as life tenure and other robust guarantees.

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So although politicians make the decisions, checks and balances form an important feature of this appointment process. The Senate can and does block nominations. And there is a well-established selection process to ensure the appointment of judges with the highest qualifications. Of utmost importance in this process is the tradition or legal culture of making selections based on objective criteria.

2. European standards for the recruitment and appointment of judges?

In Europe there is no typical or standard procedure for the appointment of judges. In fact, there are no real European standards for this procedure. Methods of judicial appointments vary according to different legal traditions and legal systems. They can also differ within a legal system. For example, judicial appointments for lower courts can be quite different from appointments to the Supreme Court or Constitutional Court.

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In a significant number of European countries the executive or legislative branches play an important and decisive role in the appointment of judges. These are mostly old democracies in Europe, in which the government (or President), sometimes in combination with Parliament, formally decides on the appointment of judges. But in these countries, there is a tradition or legal culture not to make appointments based on political criteria, but rather on objective criteria – on merit. Frequently courts or other judicial bodies in these countries make decisive recommendations for judicial appointments. These days, in many European Countries a judicial council plays an important role in selecting and appointing judges.

There are only a few countries (such as Switzerland) in Europe in which (mostly lower court) judges are appointed by the courts themselves.

3. Appointment procedures in five European countries

Let me briefly describe five different types of appointment procedures in Europe. Starting first with Germany, then the UK, France, Belgium, and the Netherlands.

In Germany there is no Council for the Judiciary. Federal judges in Germany are appointed by the Federal President (Bundespräsident), after being elected. The judges are elected for life tenure by the Judges Election Committee (Richterwahlausschuss) consisting of 16 ministers of the substates (Länder) and 16 members elected by the German Parliament (Bundestag). The committee examines the qualifications of the candidates and makes a proposal for appointment. The President (Bundespräsident) formally appoints a judge, but a federal minister is responsible for the decision. The German appointment process does not exclude potential political influence. And it has been criticized in the past. Nevertheless, there are important guarantees to ensure the decision-making process is based on objective criteria. There are checks and balances in the composition of the Judges Election Committee (ministers of the substates), there is an

effective judicial control concerning judicial appointments (appeal procedure). And perhaps, most important, there is a legal culture in Germany which respects the independence of judges.

Finally, justices of the Federal Constitutional Court are also elected, half of them by the German Parliament (Bundestag) and half of them by the Federal Council (Bundesrat).

In the UK, judges are appointed to office. There are statutory criteria for judicial qualifications. A judicial appointments committee, consisting of 15 members, is responsible for the selection of candidates. 12 members are selected by the Ministry of Justice, three members are selected from the judiciary by a judicial council. The Lord Chancellor, a member of the government, has the authority to appoint judges. He may accept the selected candidate or reject him or her if the candidate is unsuitable for office. Certain senior appointments are made by the Queen on the advice of the Lord Chancellor or the Prime Minister.

In France, judges are recruited through competition or on the basis of special qualifications (Doctor of Law). They are appointed by the President of the Republic. A judicial service commission (Conseil Supérieur de la Magistrature) makes proposals and provides advice. The commission is comprised of the President of the Court of Cassation, twelve judicial members and eight additional members, of whom two are nominated by the President, two by the President of the National Assembly (Assemblée Nationale), two by the President of the Senate, one by the bar association and one by the Council of State (Conseil d'Etat). Recommendations of this commission concerning the appointment of lower court judges are binding.

In Belgium, judges are appointed following a judicial training program or are appointed directly to a career post. They are appointed by the Crown (the King and his ministers) for an indefinite period until retirement on the basis of a motivated request by the High Council of Justice. This judicial council has 44 members who are appointed for four-year terms and, typical for Belgium, it consists of two sections of 22 members: one French speaking section and one Dutch speaking section. Each section has 11 judges or prosecutors and 11 laypersons, appointed in Parliament by the Senate with a two thirds majority vote. The construction of a judicial council was established in 2000, partly because of the politicization of the appointment process. According to GRECO in its evaluation report on the judicial system in Belgium (2014), other than initial recruitment, appointments to judicial positions of responsibility are still regarded as primarily the result of an ability to cultivate networks and the right contacts, rather than the result of merit. So even in this system with a judicial council involved in the appointment process there is no guarantee that political considerations regarding appointments are excluded.

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Finally, the Netherlands. According to some world surveys on judicial appointments, judges in the Netherlands are appointed by the monarch, the King, the same as in Morocco! Of course, we know our appointment process is not that antiquated. In the Netherlands there is a training program and selection process by an independent judicial selection committee. We do have a judicial council in the Netherlands but it does not have a decisive role in the appointment process. In addition, this judicial council does not meet the standards of the European commission. It is not independent and members are not elected by the judges.

Judges are appointed for life by royal decree (by the King and the Minister of Justice and Security). In the Netherlands, judges are appointed on the basis of objective criteria on the recommendation of the courts. These recommendations are decisive in the appointment process. Yet there are no strong safeguards against political influence. There is a legal culture in the Netherlands which respects judicial independence, but on two recent occasions the populist party of Geert Wilders (PVV) objected to Supreme Court nominations for, I think, political reasons. On one occasion this political influence was successful in its efforts. So, even in the Netherlands things might get rough!

4. Constitutional principles

From a constitutional perspective, I think three principles are important for the judicial appointment process.

First is judicial independence. Courts are not political institutions. Court judges must be neutral, independent and impartial. Their loyalty is to the law and not to a political party. Courts must be nonpolitical institutions. This means that appointments of judges that are primarily due to political motivations should be out of the question. Judges have to be appointed on the basis of specific qualifications for judicial office. In this context, I think, courts, judicial councils or judicial advisory committees must play an important role in the appointment process.

To safeguard judicial independence, the manner of appointment is important, but so are other guarantees regarding the legal status of judges. Of particular importance in maintaining judicial independence is the life tenure or tenure until retirement for judges, as well as the exclusion of government and parliament from suspending or dismissing judges or imposing disciplinary sanctions.

A judiciary without any democratic control, as a state within the state, is not acceptable.

Second is the principle of democracy. In most countries the executive and legislative branches are involved in judicial appointments. In Germany, there is a strong focus on this constitutional principle (Article 20 GG states: *"Alle Staatsgewalt geht vom Volke aus"*). So, there must be some construction of democratic control or supervision in Parliament regarding judicial appointments. A judiciary without any democratic control, as a state within the state, is not acceptable. So, in this respect I think it is self-evident that the executive or legislative branches must be involved in the appointment process.

Third is checks and balances. To prevent the concentration of government powers concerning the appointment of judges, I think it is important to divide these powers between the executive, legislative and judicial branches. A system of shared power promotes the prevention of abuses of power by one of the branches of government.

In most European countries, constitutional safeguards against political influence on judicial appointments are relatively weak. Most important is the development of a legal culture which respects judicial independence. In addition, specific safeguards regarding the legal status of judges (life tenure, no dismissal of judges by the executive or legislative branches) and special safeguards against outside pressure in the administration of justice are perhaps even more important for judicial independence.

5. The Polish court packing plans

In 1937, President Roosevelt presented a plan to make the Supreme Court and the federal judiciary more efficient. He wanted to extend the Supreme Court and appoint new justices for every justice older than 70. Everybody knew the President was trying to get a majority in court for his New Deal legislation. It was his intention to politically influence the Supreme Court by extending its composition. This Supreme Court packing plan was immediately rejected in Congress. It was a shameful act by this remarkable president.

I think it is self-evident that the new Polish laws to reorganize the judiciary represent a similar court packing plan. They have the sole intention of politically influencing the composition of the courts.

The Venice Commission, in its report on the independence of judges (2010), expressed the view that a system, such as in old democracies, in which the executive branch has decisive influence on judicial appointments may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions. I agree.

In new democracies without these legal traditions, the establishment of a judicial council with decisive influence on judicial appointments is preferred by the Venice Commission. A majority of members of this

judicial council should be elected by the judiciary itself. The European Commission states in its reports that such a judicial council meets European Standards of the Rule of law. In actuality, such 'European standards' do not exist in practice.

It is crystal clear that a judicial council can be a dangerous tool in the hands of politicians who want to influence the judiciary.

Nevertheless, the composition of the new judicial council in the Polish judiciary is one of the main problems in Poland. It is crystal clear that a judicial council can be a dangerous tool in the hands of politicians who want to influence the judiciary. Perhaps it would be even safer to decentralize the appointment process to the courts instead of handling appointments at a central level.

Concerning these Polish court packing plans, there are numerous risks for judicial independence. According to a GRECO report on Poland (March 2018), a new law stipulates a lower retirement age for Supreme Court judges (from 70 to 65 years of age), not only for future judges but also for the current judges. This looks like a classical example of a court packing plan, exclusively aimed at politically influencing the composition of Polish courts. From a constitutional perspective, this political interference in the Polish judiciary is unacceptable. Security of tenure of judges, which means life tenure or tenure until retirement, is one of the most important elements to ensure judicial independence. However, new disciplinary proceedings have been established in Poland which grant special powers to the Minister of Justice. Again, these measures constitute a real danger to judicial independence, perhaps more dangerous than a defective model for appointing judges.