



# Selecting Judges to Constitutional Courts — A Comparative Study

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Policy Paper no. 55



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# Introduction

What is the appropriate method for selecting Supreme Court justices? That question is one that drives a considerable amount of the public discourse in Israel. Ever since the enactment of the Basic Law: the Judiciary, in 1984, no fewer than 67 bills — that deal with the method by which judges are selected — have been brought to the Knesset table in efforts to amend it. During the course of the 20th Knesset alone, 12 bills were put forth to change the method of selection as well as the length of the tenure of the associate and chief justices of Israel's Supreme Court.<sup>1</sup>

According to various reports, the judicial selection method was at the heart of the coalition negotiations for establishing the 35th Israeli government in May 2019, during the course of which various initiatives were discussed regarding fundamental change.<sup>2</sup> However, the negotiations failed (for other reasons), and for the first time in its history, Israel recently held repeat elections. Nonetheless, one can assume that the issue of how Supreme Court justices are selected will continue to animate the public and political discourse in Israel in the future as well.

During Israel's nascency, the selection of Supreme Court justices (as well as the selection of judges to all other courts) rested on the decisions made by elected public officials. During those years, the minister of justice was empowered to select members of the judiciary, and his selection of Supreme Court justices required approval of the Cabinet and the Knesset.<sup>3</sup>

Then, in 1953, the Judiciary Law was enacted,<sup>4</sup> and it established the main principles of the method that is used in Israel to this day. That arrangement was re-codified in 1984 in the Basic Law: the Judiciary<sup>5</sup> and in the Courts Law,<sup>6</sup> pursuant to which, the Israeli judiciary (including the justices of the Supreme Court) are all selected by a dedicated committee comprising nine members: Two government ministers (including the minister of justice, who serves as the committee chair), two members of the Knesset, three Supreme Court justices (including the Chief Justice), and two representatives selected by the National Council of the Israel Bar Association. Following an amendment to the Courts Law in 2008,<sup>7</sup> the selection of Supreme Court justices requires the

- 1 See, e.g., the bill for Basic Law: the Judiciary (Amendment — Composition of the Judicial Selection Committee), P/3544/20; the bill for Basic Law: the Judiciary (Amendment — Limiting the Tenure of a Supreme Court Justice), P/4009/20; the bill for Basic Law: the Judiciary (Amendment — Limiting the Tenure of a Supreme Court Justice), P/4203/20; the bill for Basic Law: the Judiciary (Amendment — Knesset Selection of the Chief Justice of the Supreme Court), P/4529/20.
- 2 Tal Schneider, *The Union of Right Wing Parties Published Its List of Demands to Join the Coalition*, GLOBES April 22, 2019, <https://tinyurl.com/y6d59vur>; Hagai Amit, *En Route to the Ministry of Justice — Smotrich Promises Netanyahu to Support His Immunity*, THE MARKER April 23, 2019, <https://tinyurl.com/yxb3h4kz>; Yehuda Yifrah, *Saladin's Battles*, MAKOR RISHON May 7, 2019, <https://tinyurl.com/yyyy5bu8>.
- 3 See the explanatory notes to the bill for the Judiciary Law, 1951-5711, HH 120, 124.
- 4 The Judiciary Law, 1953-5713, SH 149.
- 5 Art. 4, Basic Law: the Judiciary.
- 6 §§6-10, Courts Law [Consol.], 1984-5744 (which replaced a number of older statutes, including the Judiciary Law).
- 7 The Courts Law (Amendment No. 55), 2008-5768.

support of seven out of the nine members of the committee (as opposed to appointment of lower court judges, which requires only an ordinary majority). Thus, given the composition of the committee, as a practical matter, it is currently impossible to select a Supreme Court justice in Israel without the support of at least one of the Supreme Court justices who is a member of the committee.

Some of the proposals for modifying the selection process that have been raised over the years sought to increase the relative weight carried by the elected public officials on the existing committee but refrained from promoting a more significant, fundamental change to the selection process itself. Recently however, demand has intensified to transfer exclusive responsibility for the selection of Supreme Court justices to elected public officials. Thus, for example, toward the end of the 20th Knesset, then minister of justice Ayelet Shaked announced her intent to initiate a comprehensive and in-depth change in the selection process, by which this task would be given to the Cabinet—who would select a candidate based on the minister of justice's recommendation—and then submit its selection for the Knesset's approval.<sup>8</sup> On the other hand, there are those who call, even now, for blocking any change to the method of judicial selection, based on an objection in principle to the dominance of elected public officials in the process.<sup>9</sup>

We sought to enrich the impassioned Israeli discourse on the subject with this comparative review of the methods by which judges are selected to the highest constitutional courts of prominent countries. This study was prepared for that purpose. Our intent is first and foremost to examine the affirmative element of the issue: Meaning, whether, according to foreign systems of law, the selection of judges to the highest constitutional court is tasked to elected public officials and whether initiatives in that vein that were proposed in Israel are indeed that exceptional in comparison to other countries around the world. The affirmative selection methods that are in practice in the countries reviewed reflect various normative balances, primarily regarding one principal question: Whether it is proper to place the selection of judges for the highest constitutional court in the hands of elected public officials or perhaps is it more appropriate to condition such appointments on the approval of professional legal entities who are without political affiliation.<sup>10</sup> Thus, at the outset of this study, we will provide a summary of the arguments for and against the selection of judges to the highest constitutional court by elected public officials. We will keep this normative map before us as we engage in the affirmative survey at the core of this study.

8 Zvi Zerahia and Moshe Gorali, *Shaked's Plan: The Knesset Will Appoint Supreme Court Justices*, CALCALIST March 18, 2019, <https://tinyurl.com/y4kuefkz>; Joshua (Josh) Breiner and Jonathan Lis, *Shaked's Plan: The Knesset Will Appoint Supreme Court Justices Instead of the Judicial Selection Committee*, HAARETZ March 18, 2019, <https://tinyurl.com/y6mdfw4>.

9 See Yedidia Stern, *The Gospel According to Shaked*, YEDIOT AHARONOT—News February 24, 2018, <https://tinyurl.com/yxtk67gb>. For a similar position, see Guy Lurie, *Don't Touch the Judicial Appointment Process*, GLOBES June 17, 2019, <https://tinyurl.com/y43z8ns5>.

10 Regarding the balance between the measure of accountability of the justices of such a court and the need for them to act independently (as well as the scope of its powers), see Yoav Dotan, *Judicial Review in the Constitutional Framework: The Question of Accountability—a Comparative View*, 17 LAW AND GOVERNANCE 489, and in particular 493-496, 508-510 (2007).

Before addressing the merits of the issue, we must properly focus the study's question. This paper will deal with the method for selecting judges for **the highest constitutional courts** in various countries — a dedicated constitutional court or a supreme court (which alongside being a constitutional court also serves as the highest appellate court). Such a court is the spearhead of judicial review of governmental action (including, in some instances, by overturning legislation) and has the potential to dominate (even if indirectly) in discussions that determine questions of public policy.<sup>11</sup>

Naturally, the scope of the powers of the court being examined and in particular, its ability to overturn parliamentary legislation impact the power relationship between the three governmental branches. In countries where the highest constitutional court is not empowered to overturn legislation, the supremacy of the legislature (sovereign) in setting public policy remains unassailable even if the process of judicial selection is not controlled by elected public officials. On the other hand, where the court is granted the power to overturn legislation, its ability to impact the determination of public policy is greatly augmented. Therefore, in the latter scenario, there is also increased importance in aligning, to an extent, the positions held by the sovereign — meaning, the nation — with the prevailing positions among the judiciary.

This study does not examine whether elected public officials are involved in the judicial selection process but rather whether the judiciary is selected as a result of a democratic majority decision. In a situation in which figures who are not elected public officials can join forces with a minority of elected public officials and thus become the determinative factor in selecting judges who are not acceptable to representatives of the majority, such judges are not selected by a democratic majority decision. Therefore, the relevant question for this study is whether elected public officials **exclusively** decide the identity of the candidate for selection. An additional derivative of the above criterion relates to the involvement of unelected professional legal entities in the process and in particular, to the question of whether they have an **inherent** defined role in the selection process. To be precise, voluntary consultation with relevant professionals is desirable and obvious according to all opinions. However, we sought to examine whether there are specific professional entities that are an inherent part of the selection process. If such inherent involvement on the part of jurists was found, we examined whether it is in fact obligatory (meaning, whether their consent constitutes a *sine qua non* to the selection of a candidate), whether such involvement is statutory (expressly defined in the language of the law) or whether it is a custom that has taken root in the country over the years, and whether such jurists are themselves elected by political entities and therefore, their selection is likely to reflect, even indirectly, the preferences held by elected public officials.<sup>12</sup>

11 This distinction is particularly important with respect to legal systems that include constitutional courts. In such countries, the institution of a supreme court, despite its official name, serves only as the highest **appellate** court, which is subordinated in rank to the constitutional court and bound by its caselaw.

12 In our opinion, the distinction between binding recommendations of jurists and recommendations that leave elected public officials with the right to have the last word has not received sufficient attention in prior studies on the subject and has thus led to distortions in comparative reviews of various legal systems around the world. A recent example of this may be found in Guy Lurie, *The Judicial Selection Committee*, ISRAEL DEMOCRACY INSTITUTE, 2019, at 81[hereinafter Lurie, *The Judicial Selection Committee*] and, in the specific context of the Canadian legal system at 89-90.

The length of judicial tenure is also relevant to the question of the measure of the public's influence on the character of the court, and therefore, this issue was also included in the study. When the length of judges' tenure is defined, such influence is constant. Conversely, when judges hold life appointments, there is an increased likelihood that over the years, a gap will form between the position held by the public and its elected representatives, on the one hand (which, we must remember, changes with the turnover in the legislature and in government), and, on the other hand, the ideological positions represented in the composition of the court. Another mechanism for reinforcing the connection between the public and the character of the court is renewable terms. Thus, a judge must take into account the need to reflect prevailing values and positions held by those entities who select him if he intends to be reselected. However, such a mechanism also involves an inherent and real danger to judicial independence.

Finally, in reviewing the arrangements in various legal systems, we must distinguish between the **selection** of judges and their **appointment**. Many countries, including Israel, give the appointment of judges to a ceremonial entity while the actual decision regarding the identity of the judges who will be appointed is given to another entity. Therefore, it is important to emphasize that we have focused the question in this current study on the identity of the entity who decides on the **selection** of judges, whereas the identity of the appointing entity is merely background information that is incidental to our analysis.

Given all of the above, and in order to appropriately address the study's question, we have included a series of sub-characteristics in our review of methods for selecting judges that are helpful in properly clarifying the power relationship between the public and its elected officials, on the one hand, and the members of the highest court in each country, on the other:

1. What is the relevant court type — a supreme court or a constitutional court?
2. What is the method by which the judges are selected for that same court?
3. Is an absolute or a qualified majority required in order to select a candidate?
4. What are the qualifications for serving on that court?
5. Is the court in a given country empowered to overturn primary legislation?
6. Has there been a judicial declaration of a constitution in a given country?
7. Is the duration of the tenure of the court's members defined and is it up for renewal?

Only a few comparative surveys of judicial selection methods in various countries around the world have been previously published in Israel.<sup>13</sup> In all of them, so it would seem, the sampling of countries was not based on an orderly and clear rationale. Additionally, when we went back and examined a number of those studies, we found several inaccuracies that require correction. Some of them derive, in our opinion, from the researchers' adherence to the language of the country's constitution without an in-depth examination of additional binding arrangements or actual practices. Our study supplies this deep analysis as well as provides a much-needed picture of the current situation in these different

13 Mordechai Heller, *Judicial Appointments — The Solution to the Supreme Court Crisis*, 8 AZURE 54 (1999); Izchak Klein & Moshe Koppel, *Toward a Balance: The Balance of Israeli Government Authorities' Powers and the Method of Judicial Appointment*, THE ISRAEL POLICY CENTER, 2003; Dina Zadok, *Methods for Appointment of Members of the High Courts — A Comparative Survey*, KNESSET RESEARCH AND INFORMATION CENTER, 2010; Dr. Aviad Bakshi, *Changing the Method of Judicial Selection in Israel*, INSTITUTE FOR ZIONIST STRATEGIES, 2011; Guy Lurie, *The Method of Judicial Selection in Israel and the World — Comparative Background*, ISRAEL DEMOCRACY INSTITUTE, 2018; Zeev Lev, *The Judicial Selection System in Israel and Around the World*, MOVEMENT FOR GOVERNABILITY AND DEMOCRACY, 2019. See also an eclectic survey of countries in Lurie, *The Judicial Selection Committee*, *supra* note 12, at 79-95.

countries given the not insignificant changes that have occurred in recent years in a number of prominent countries. Our paper also offers the added value of surveying a significantly larger number of jurisdictions.

The below survey will deal with countries falling into three categories. In each category, we have examined all member countries with the goal of preventing bias in selecting the subjects of the study:

- A. The 37 member states of the Organization for Economic Corporation (OECD) — an international organization established in 1961 in order to promote economic prosperity as well as the values of individual freedom. The OECD is considered a prestigious club whose members are the most influential democracies in the Western world. Israel has been a member of the OECD since 2010.
- B. The 30 leading countries in The Economist's 2018 Democracy Index (where Israel placed 30th). We chose to address this group given the assertions that are made (on both sides of the vibrant local debate) regarding erosion of Israeli democracy and the rule of law<sup>14</sup> as well as out of an understanding that there is no dispute that the method for selecting the members of the highest court impacts the democratic character of the country. 24 of those same countries are members of the OECD. Therefore, in the chapter on The Economist's 2018 Democratic Index, we will only survey the six additional countries that are not members of the OECD.
- C. The 50 individual states of the United States. Although the core of this study relates to arrangements in practice at a national level (especially in federated states such as Australia or Canada), we believe that it would be improper to completely ignore the rich experience of the most established of the constitutional democracies. Furthermore, as we shall present below, the selection methods in most states in the US include the direct election of judges at the ballot box by the electorate, an alternative that is generally absent from the national methodologies that are reviewed in the other parts of this study. Even though such methodologies give rise to their own unique problems (that lie outside the limits of this discussion), it is important to be familiar with them as an additional perspective for our discussion of the most appropriate method for selecting the members of the highest court.

Therefore, the study is composed as follows: The first part will include a concise, normative map of the primary arguments for and against giving the selection of the members of the highest constitutional court to elected public officials. The second part will survey the methods of selection of members for the highest constitutional courts in all OECD member states. The third part will survey the methods of selection of members of the highest constitutional courts in six additional countries that are ranked in the top 30 spots in the Economist's 2018 Democracy Index but are not members of the OECD. The fourth part will survey the methods of selection of the members of the supreme courts in all 50 states in the US. The last part of this study will analyze and summarize our findings.

14 See, e.g., the press release by the Israel Democracy Institute dated March 18, 2019, following the declarations by the then minister of justice Ayelet Shaked, regarding her plans for reforming the legal system, on the Institute's website available at [www.idi.org.il/articles/26236](http://www.idi.org.il/articles/26236). For an approach that views the current status quo as damaging to democracy, see Avishai Grinzaig, *Returning the Reins to the Nation's Elected Officials*, ARUTZ 7 — NEWS Nov. 3, 2016, <https://tinyurl.com/y2bj5zyz>.





## Part One — Normative Background

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As we have noted, our goal in this study is to provide the Israeli reader with an informative comparative and comprehensive survey of the methods by which the judiciary is selected for the constitutional courts in a line of leading democracies. With that, one must remember that this survey is coming to light as part of the Israeli discourse regarding the most appropriate method of judge selection. Therefore, we have seen fit to in fact start with a brief and concise examination of the normative considerations at the basis of the discourse on this subject in Israel and around the world. We emphasize that it is not our intention to review all of the academic literature on the subject (which has naturally been discussed at length over the years) but rather to provide a summary discussion of the principal considerations that lie before policymakers when they seek to adopt one method or another for staffing a constitutional court.

The starting point of this discussion is the type of courts being discussed. These are courts that do not deal solely with legal-professional issues or resolving concrete disputes but rather also (and some might even say primarily) deal with establishing policy arrangements that are broad in scope. The matters that are brought before such courts are of great public importance, necessarily requiring the balancing of many values, and for the most part are at the center of the ideological and political disputes that divide society.<sup>15</sup> Indeed, it is hard today to accept the claim that a court that interprets a constitutional text is performing a solely "professional" act that does not involve ideological and value-based decisions.<sup>16</sup> It is this fact that drives the normative discourse regarding the judicial selection process for those courts, and it is what has led to the mobilization of two main camps: one that supports judicial selection by the public or its elected officials and the other that demands an apolitical and independent selection.<sup>17</sup>

15 Gideon Sapir, *The Constitutional Process as a Political Process*, 19 THE BAR ILAN JOURNAL OF LAW STUDIES, 461, 468-470 (2003).

16 Aviad Bakshi, *Changing the Judicial Selection Process in Israel*, INSTITUTE FOR ZIONIST STRATEGIES, 2011, at 8-9 and in particular, the reference therein to Yoav Dotan, *Does Israel Need a Constitutional Court?*, 5 Law and Governance 117, 137 (2000).

17 Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 107 (2009). See also R. DANIEL KELEMEN, SELECTION, APPOINTMENT, AND LEGITIMACY: A POLITICAL PERSPECTIVE, IN SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 244, 245, 251-252 (Michal Bobek ed., 2015), which addresses the process of judicial selection for the highest constitutional courts in Europe — the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

Those who champion judicial selection by the public posit first and foremost that because the judiciary deals with social/value-based questions with broad social impact and reviews the actions of the legislature, it must be answerable to the citizenry.<sup>18</sup> Public selection could be organized at the first echelon, where a judge is elected directly through a dedicated system of elections (at times even for a renewable term). Alternatively, it can be effected at the second echelon, where a judge is selected by the public's representatives, who in turn are accountable to the citizenry regarding their judicial selection. Either way, the supporters of this method view it as necessary to entrust the selection of the judiciary to the nation based on the understanding that the measure of the constitutional court's influence in determining public values at times rivals that of the legislature and even surpasses it.<sup>19</sup> This ensures that the public's values find expression in the constitutional court's decisions and thus imbues them with democratic legitimacy.<sup>20</sup> Conversely, a system that is based on apolitical selection would suffer, they claim, from a severe democratic deficiency to the point of fundamentally damaging the democratic regime itself.<sup>21</sup> The role of a judge in a constitutional court, according to this approach, is to utilize his or her legal skills in order to "translate the public's positions into legal language and apply the public's outlook in the constitutional framework."<sup>22</sup> To this end, she must necessarily apply value-based judgment.<sup>23</sup> Thus, for example, in the context of Israel, it is hard to find a professional answer that is detached from the judge's values as to questions such as who is a Jew,<sup>24</sup> what is the importance of the study of Torah by yeshiva students as a public value,<sup>25</sup> or how does one balance between the rights of residents of Gush Katif vis-à-vis the political purpose of the disengagement plan.<sup>26</sup> Thus, it is also desirable that the public have the ability to influence the identity of those entities who are supposed to carry out their worldview.

Alongside the argument based on democracy as a matter of principle, proponents of this approach also present a number of pragmatic arguments as to its benefits. First, they argue that regarding issues brought before a constitutional court that are not purely questions of law but rather require a delicate balance among competing social values (at times vague), there is no reason to prefer the judgment of "professional" jurists. On the contrary, in such cases, it would seem that the best decision would in fact be made in the "marketplace of ideas," which reflects the various ideological streams that are prevalent in society. On the other hand, an apolitical selection process would in fact likely result in an ideologically homogenous court composition rather than a multifaceted

18 Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: the Debate over Judicial Appointments in the United Kingdom*, 14 INT'L J. CONST. L. 753, 763-765, 771 (2016); Abraham Tennenbaum & Sivan Ratzon, *On the Judicial Selection Committee — Insights from Game Theory, the Wisdom of the Multitude, and Group Intelligence for the Improvement of Its Composition and its Procedures*, 24 THE LAW 176, 184 (2018).

19 Tennenbaum & Ratzon, *supra* note 18, at 177; Sapir, *supra* note 15, at 476-477.

20 For further details regarding this position, see Gideon Sapir & Shaul Sharf, *Popular Constitution*, 30 BAR ILAN JOURNAL OF LAW STUDIES 161, 164-166 (2015).

21 P.D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?* 23 FLORIDA STATE U. L. REV. 1, 11 (1995). See also Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES IN LAW 25 (2002) [hereinafter Ginsburg, *Design of Constitutional Courts*] where the author discusses the danger of apolitical selection leading, in practice, to the court having control over the legislature. It is clear that such a danger involves more than the issue of the judicial selection process and that it can be mitigated as well by means of additional mechanisms that will encourage dialogue between the three branches, for example, by means of a constitutional override mechanism (see, e.g., Sapir, *supra* note 15, at 479-483).

22 Sapir & Sharf, *supra* note 20, at 164.

23 Sapir, *supra* note 15, at 470-471.

24 Compare the majority and minority opinions in HCJ 58/68 *Shalit v. The Minister of Justice*, 23 PD 477 (1970).

25 Compare HCJ 6298/07 *Ressler v. The Israel Knesset*, Nevo Legal Database (Feb. 21, 2012) and HCJ 200/83 *Wataf v. The Minister of Finance*, 38(3) PD 113 (1984).

26 Compare the majority and minority opinions in HCJ 1661/05 *Gaza Coast Regional Council v. The Israel Knesset*, 59(2) PD 481 (2005).



composition.<sup>27</sup> Second, they reason, the more the various parts of the populace feel that their values find expression in the constitutional court's caselaw, the greater the increase of the public's confidence in the court as an institution and its caselaw. Conversely, an apolitical selection process based on "professional" selection methods is likely to create a disconnect between the nation's values and those values advanced by the constitutional court. Creation of a public sense that the members of the court are nothing more than "robed nobility" that is above the populace is decidedly likely to result in damage to the court's image and, ultimately, even to the values that the judiciary is entrusted with advancing.<sup>28</sup> Third, they opine, the democratic selection mechanism is likely to yield a court composition that reflects the various groups in the population not only in terms of ideology but demographically as well (in terms of gender, ethnicity, religion, etc.). This kind of diversity is also expected to strengthen the public's confidence in the court,<sup>29</sup> whereas a court that is not sufficiently varied will lose at least some of the public's confidence.<sup>30</sup>

On the other side of the debate are those who oppose the democratic arrangement described above and espouse an apolitical selection process that rests on the judgment of professional legal entities. They also present a line of considerations in support of their position, foremost of which is a concern over mixing politics with law. In practice, this is an argument that combines a number of different considerations. There are those who view the law as a sublime and pure concept that simply must not be stained by interest-based political considerations.<sup>31</sup> Others express a concrete concern that judicial selection by a political entity is likely to result in double-biased rulings: The appointed judge is likely to concretely benefit the political entity or entities that selected him or her, and, furthermore, it is argued that it is inappropriate for a judge, whose entire function is to engage in review of governmental actions in their broad sense, to be selected

27 Sapir & Sharf, *supra* note 20, at 169-173; Sapir, *supra* note 15, at 476. See also Iddo Porat, *A Constitutional Takeover in Israel — For Real?*, ICON-S-IL Blog (June 8, 2017), <https://tinyurl.com/y3be7any>.

28 Sapir & Sharf, *supra* note 20 at 174; Menachem Mautner, *Appointment of Supreme Court Justices in a Multicultural Society*, 19 Bar Ilan Journal of Law Studies 423, 425-426, 428 (2003). Contrary to the criticisms that he addresses, Mautner himself in fact espouses an elitist position whereby the court must reflect the values of (what is in his view) an "ideal" Israeli society (see id. at 445-448). Needless to say, this position amounts to support of judicial tyranny and, in our opinion, must be rejected out of hand. See also Ginsburg, *Design of Constitutional Courts*, *supra* note 21, at 33, where the author analyzes the judicial selection process in Israel as the conduct of an elite that is protecting its power.

29 For a discussion of this rationale, see SELECT COMMITTEE ON THE CONSTITUTION, JUDICIAL APPOINTMENT PROCESS: ORAL AND WRITTEN EVIDENCE, HL, at 17 (March 28, 2012) [hereinafter HOUSE OF LORDS COMMITTEE REPORT]; Jan Van Zyl Smit, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES: A COMPENDIUM AND ANALYSIS OF BEST PRACTICE 20 (2015). See also EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), VADEMECUM ON CONSTITUTIONAL JUSTICE 6-7, 10 (May 11, 2007), <https://tinyurl.com/y2xqx62y>; ("By likening the composition of the court to the composition of society, such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people... While the composition of a constitutional court may and should reflect inter alia ethnic, geographic or linguistic aspects of the composition of society, once appointed, each judge is member of the court as a collegiate body with an equal vote, acting independently in a personal capacity and not as a representative of a particular group.").

30 Delaney, *supra* note 18, at 766-767.

31 It appears that this deontological position is behind the concern that Aharon Barak presents in AHARON BARAK, *The Supreme Court as a Constitutional Court*, in Volume D — ON THE COURT AND ITS JUDGES in SELECTED WRITINGS 85, 90 (2017) "Indeed, one of the negative results of a European-style constitutional court is that the appointments to such a court are of a political character. The various political parties represented in parliament appoint members of their own camp to this constitutional court. A constitutional judge, in contrast to a professional judge, is considered a 'political' judge. A similar negative result is also found in a number of common law countries such as the United States... It is hard to understand why other parties lend a hand to this idea whose immediate result is the politicization of the highest court in the land. Why damage one of the most valuable assets that the State of Israel possesses — a professional and apolitical legal system?" See also Webster, *supra* note 21, at 10; van Zyl Smit, *supra* note 29, at 11-12.

by the very system that she is entrusted to review.<sup>32</sup> According to this approach, the nature of the constitutional court's function and the importance of its decisions require, more than in any other court, an independent judiciary so that there will not be a concern that the judges' decisions will be influenced by outside factors. As a matter of principle, it is argued, the task of the constitutional court's judiciary is to rule according to the constitution and not according to popular opinion.<sup>33</sup> Furthermore, entrusting the selection process to political entities is likely to provide the coalition in power at a given point in time with a tool by means of which it may "pack" the court with judges who support its positions and who will continue to determine public policy even in the event that the government is replaced by a coalition that supports a different ideology (to the extent that the judges' tenure is not limited in time).<sup>34</sup>

Another consideration presented in support of an apolitical selection process relates to the professionalism of the selected personnel. According to this position, the fact that the constitutional court judiciary deals with the most complex and important questions requires that they be particularly professional and of high-caliber. Political involvement in the selection process (whether by the public or by its representatives) is likely to result in the appointment of less professional entities.<sup>35</sup> Thus, for example, they contend, it is conceivable that a mediocre candidate will be put forth by an entity with an interest or without a sufficient understanding of the requirements of the position.<sup>36</sup> Alternatively, candidate selection in the framework of negotiations between a number of political representatives is likely to result in a compromise appointment and not the selection of the most appropriate candidate from a professional standpoint.<sup>37</sup> Conversely, judges and jurists are perceived by supporters of this approach as impartial professional entities who will put forth for this position only the most qualified of candidates.<sup>38</sup> A tangential consideration relates to the makeup of the court's composition, according to which an apolitical selection process is in fact that which will best ensure that the constitutional court is staffed by representatives from all social strata. Meaning, an apolitical process will enable ensuring that minority groups (ethnic or ideological) who do not have great political power will nevertheless receive representation in the court's composition.<sup>39</sup>

Finally, those who support the apolitical selection process also latch on to the issue of the public's faith to justify their position. First, as we noted above, there are those who claim that the demographic, ethnic, or ideological makeup of the court necessarily also impacts the public's faith therein. If we accept the assumption that an apolitical selection process is the optimal way to promote such diversity, it would also ensure the public's faith in the institution itself. Second,

32 LENNY ROTH, JUDICIAL APPOINTMENTS, Briefing Paper No. 3/2012, at 2, 15 (2012); HOUSE OF LORDS COMMITTEE REPORT, *supra* note 29, at para. 14; Lurie, *The Judicial Selection Committee*, *supra* note 12, at 60, 65. For a similar argument, in a slightly different context, see Webster, *supra* note 21, 7-9.

33 For further discussion regarding the importance of the independence of the court that is charged with interpretation of the constitution, see Sapir, *supra* note 15, at 473-476; Delaney, *supra* note 18, at 759.

34 Barak, *supra* note 31, at 94. Nevertheless, as we have noted, it is possible to deal with this concern with relative simplicity by means of delimiting judicial tenure or staggered appointments. See, in this context, Sapir, *supra* note 15, at 490-491, and in particular, at 491, n. 107; Kelemen, *supra* note 17, at 252-253.

35 *The Judicial Selection Procedures Committee Report*, pars. 27-29 (2001), NEWS1, FIRST DEPARTMENT, <https://www.news1.co.il/Archive/004-D-250-00.html>.

36 Webster, *supra* note 21, at 14. Another danger is that the appointment of a candidate from one political camp will be endlessly delayed by members of the opposing camp for purely political reasons (as happened a number of years ago in the United States, where the Republican-led Senate stymied the appointment of the Democratic party's candidate, Judge Merrick Garland, to the US Supreme Court). Regarding this concern, see van Zyl Smit, *supra* note 29, at 26.

37 *Id.*; Lurie, *The Judicial Selection Committee*, *supra* note 12, at 67-68; Tennenbaum & Ratzon, *supra* note 18, at 182. We note that a similar claim can be made against any negotiation-based selection method, including the one that is used in Israel today.

38 *Id.* at 203; Delaney, *supra* note 18, at 760; Webster, *supra* note 21, at 14. With that, there is no doubt that this is a claim that is difficult to prove empirically. See, e.g., *id.*, at 31-32.

39 *Id.* at 33; R. Sackville, *Three Issues Facing the Australian Judiciary*, 20 *Judicial Officers Bulletin* 17, ¶ 20 (2009).

it is claimed that a political process is likely to color the court or any or all of the judges serving on it in various and sundry political colors and in so doing, will harm their image of neutrality and objectivity.<sup>40</sup>

In our opinion, it is improper to present claims regarding the public's faith in — or the level of professionalism of — the judges who are selected via a method that does not represent the public, without a sufficient basis of empirical research. On the contrary, when the membership of such an important court is on the table, it is only right for such claims to be supported by clear and persuasive facts, and such facts, at least currently, have not been adduced.

Thus, for example, one would need to empirically research the possibility that judges or lawyers who participate in the selection process of a constitutional court also weigh political considerations and at times, give preference to such considerations at the expense of the professional quality of candidates. If it turns out that this is the case, then the public's confidence is in fact shaken when such considerations are entertained by those who cover themselves in the cloak of professionalism.<sup>41</sup> Similarly, one should ask whether those countries who select judges for their constitutional courts by means of the public or its elected representatives indeed suffer from having inferior judges from a professional point of view, or from decreased public confidence in the institution of the court. Each of these requires grounded empirical research (which even we do not purport to present). Either way, we did not find that proponents of the professional selection method indeed proved that their approach leads to improved quality of judicial professionalism or an increase in the public's faith in judicial decisions.

In closing, we must remember that the court that is at stake here is a special breed. It is a constitutional court that deals with issues that go to the heart of society; an institution that, not only dryly applies the language of the law, but also decides the most important and influential issues, which mission requires a delicate balancing of conflicting values.<sup>42</sup> We believe that the democratic method requires **public** input on such issues.<sup>43</sup>

Therefore, it is our position that the need for judicial decisions to be democratically legitimate must be the decisive consideration in determining the process by which constitutional courts will be staffed.<sup>44</sup> Accordingly, any arrangement for the selection of judges for a constitutional court must be one that **gives the control** over selecting the identity of such judges to elected public officials. One cannot allow harm to the democratic character of a given system of government solely out of considerations of professionalism and independence. Although these considerations have undeniable importance, they can be given expression in the design of the specific characteristics of the selection process that is entrusted to the public. Thus, for example, judicial independence can be reinforced through strict budgetary independence mechanisms or by establishing a non-renewing term of appointment, and judicial professionalism can be ensured by laying clear professional threshold conditions or by establishing a **nonbinding** mechanism for consulting with professional bodies. Any arrangement that would compromise the foundations of the democratic nature of government is unacceptable. Rather, elected public officials and representatives must be the entities exclusively empowered to select the members of the constitutional court. Indeed, as we shall show below, influential and prominent democracies throughout the world have adopted this last-mentioned arrangement.

40 Tennenbaum & Ratzon, *supra* note 18, at 185; Lurie, *The Judicial Selection Committee*, *supra* note 12, at 63-64; Webster, *supra* note 21, at 9-10. See also Adam Goldenberg, *Why Canada's Supreme Court Appointments are Nothing Like America's Circus*, *MACLEAN'S*, July 16, 2018, <https://tinyurl.com/y4xj2cxx>.

41 Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 *Alb. L. Rev.* 803, 811-813 (2003).

42 Ota Liebman, *The Role of the Federal Constitutional Court as Guardian of the Constitution*, 28 *Hebrew Univ. Law Rev.* 5, 8 (1996).

43 Bakshi, *supra* note 16, at 8-9; Sapir, *supra* note 15, at 468-471.

44 Kelemen, *supra* note 17, at 251-252. See also Sapir & Sharf, *supra* note 20, at 10 177-178.





## Part Two — OECD Member States

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The Organization for Economic Cooperation and Development (OECD) is an international organization currently comprising 37 member states. The OECD was established in 1961 in order to promote economic prosperity and policies based on free market principles by means of broad-based research, performance comparison, and the sharing of information between member states.<sup>45</sup> Membership in the OECD imparts international status and prestige.<sup>46</sup> The economies of the OECD's member states together constitute approximately 62% of the world's GDP (as of 2018).<sup>47</sup> The OECD does not have official preconditions for joining its ranks, but those states who apply for membership must demonstrate a willingness to preserve the rule of law and protect human rights as well as promote a transparent and free market economy.<sup>48</sup> Israel joined the OECD in 2010.<sup>49</sup> Joining in April 2020, Colombia was the most recent country to be added to the organization.

45 Additional details may be found on the OECD website at [www.oecd.org/about](http://www.oecd.org/about).

46 Moti Basok, *Israel Is Closer Than Ever to Joining the OECD Next Week*, Haaretz, May 9, 2007, [www.haaretz.co.il/misc/1.1407979](http://www.haaretz.co.il/misc/1.1407979). Similarly, see the description on the Israel Democracy Institute website at [www.idi.org.il/articles/16412](http://www.idi.org.il/articles/16412).

47 See details on the Finance Ministry's Chief Economist's website at <https://tinyurl.com/y47dcge3>.

48 Trade Union Advisory Committee to the OECD, *OECD Membership and the Values of the Organisation 2* (2018), at <https://tinyurl.com/y47dcge3>.

49 Barak Ravid, *Israel Has Been Accepted to the OECD*, Haaretz, May 10, 2010, [www.haaretz.co.il/news/politics/1.1559341](http://www.haaretz.co.il/news/politics/1.1559341).



## The United States

<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The president of the country (head of the executive branch), with the approval of the Senate
<b>Additional Details</b>	—
<b>Term</b>	For life
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

Although every court in the United States has the power to engage in judicial review of the constitutionality of laws passed by Congress, the final arbiter of that issue is the US Supreme Court, in which nine justices serve.<sup>50</sup> In addition, the Supreme Court also serves as the court of final appeal on all aspects of US law. All cases that come before the Supreme Court are deliberated and decided en banc.

The US Constitution does not define the threshold conditions for appointment to the bench on the Supreme Court. In practice however, it is customary to appoint jurists who are considered particularly professional and talented. Frequently, these are graduates of the nation's leading law schools. In most cases, candidates are selected from among sitting judges — whether on a federal court or one of the various state courts in the United States. The justices on the Supreme Court are appointed for life, without any age restrictions, and it is not rare to find among them jurists who have previously served in various government positions on behalf of the Democratic Party or its counterpart, the Republican Party.<sup>51</sup>

The judicial appointment process for the Supreme Court (and in fact, the appointment process for all federal courts) is expressly defined in the federal constitution: The president (the head of the executive branch) selects the candidates.<sup>52</sup> The selection is generally based on clear political-ideological grounds.<sup>53</sup> Each candidate undergoes a hearing before the Senate Judiciary Committee — a legislative committee whose makeup reflects the relative power of each of the two parties then represented in the Senate itself. During the course of the hearing, the candidate is asked questions on various subjects with an emphasis on her

50 U.S. CONST. art. III, §1.

51 For example, Elena Kagan, who currently sits as a justice on the Supreme Court, previously served as an advisor to US President Bill Clinton. Similarly, the current chief justice of the Supreme Court, John Roberts, held a governmental position in the White House during the administrations of Ronald Reagan as well as George H.W. Bush. For details, visit the US Supreme Court's website at: [www.supremecourt.gov/about/biographies.aspx](http://www.supremecourt.gov/about/biographies.aspx).

52 U.S. CONST. art. II, §2, cl. 2.

53 See, e.g., Barry J. McMillion, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote 3* (2018), <https://fas.org/sgp/crs/misc/R44234.pdf>.

political and ideological positions, after which, the committee votes (by ordinary majority) whether to recommend the appointment, to reject the candidate, or to abstain from making a recommendation. The committee sends its recommendations to the full Senate for confirmation or rejection. If the Senate confirms the president's candidate (by an ordinary majority),<sup>54</sup> the President signs an order of appointment, and the justice is sworn in to her position.

Below, in a separate chapter, we shall present the methods for selecting the justices on the highest courts of the 50 states comprising the United States and we shall show that in all of them, there is a dominant public choice component — whether directly at the ballot box or by means of elected representatives.

54 U.S. CONST. art. II, §2, cl. 2.. See also the description on the US Federal Courts' website at <https://tinyurl.com/y6xky9mf>.



## Germany

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	By both legislative bodies: Eight representatives from the Bundestag and eight from the Bundesrat
Additional Details	Ceremonial appointment by the president of the country (who is not the head of the executive branch)
Term	Twelve years (no reelection) or until the age of 68
Elected Public Officials Decide	Yes
Involvement by Jurists	No

The Federal Constitutional Court, which is empowered to engage in constitutional review of the country's laws,<sup>55</sup> includes two chambers, with eight judges in each chamber. At least three of the judges in each chamber must be selected from among the federal supreme courts in Germany<sup>56</sup> and on the condition that they served in their positions for at least three years.<sup>57</sup> The remaining judges may be selected from among the nation's attorneys. Additionally, judicial candidates must be at least 40 years old. The judges of the Constitutional court serve for a one 12-year term (but regardless, retire upon reaching the age of 68).<sup>58</sup>

Half of the Federal Constitutional Court's judges are selected by the Bundesrat by a special majority of two-thirds of those voting. The other half is selected by the Bundestag by a secret plenary vote and based on the recommendation of its committee comprising 12 members who reflect the political power balance in that body (The recommendation itself requires the support of eight of the committee members before it can be passed on for a vote by the plenum). A selection by the Bundestag requires a special majority of two-thirds of the vote, **constituting an absolute majority** of its members (meaning, parallel to Israel, two-thirds of the votes cast, which are at least 61 members of the Knesset).<sup>59</sup> We must note that in the past, prior to the enactment of the Law Code

55 Grundgesetz [GG] art. 93 [the Basic Law for the Federal Republic of Germany, hereinafter, the German Constitution]; Law Code of the Federal Constitutional Court (Germany), art. 13 (Bundesverfassungsgerichtsgesetz (BverfGG)), at <https://germanlawarchive.iuscomp.org/?p=221>.

56 As a country that ascribes to the continental law tradition, there are a number of parallel and distinct judicial hierarchies in Germany. Each of these is specifically designed to deal with a separate and dedicated area of German law. Thus, alongside the Federal Constitutional Court, the country also has courts for civil and criminal law, administrative courts, labor courts, and tax courts. Above each of these systems is a dedicated federal supreme court. A similar administrative-judicial structure may be found in the other countries that follow the continental law tradition (including those surveyed in this study).

57 Law Code of the Federal Constitutional Court art. 2 (Germany).

58 Law Code of the Federal Constitutional Court art. 4 (Germany).

59 Law Code of the Federal Constitutional Court art. 6(1) (Germany).



of the Federal Constitutional Court in 2015, the committee was the body that selected, on behalf of the Bundestag, the judges with whose selection it was entrusted, without requiring approval by its plenum.<sup>60</sup> Thus, the German method for selecting judges to the Federal Constitutional Court, which in the past had already been based on the principle of democratic representation, was recently changed to amplify this characteristic of representativeness even more. The president and the vice president of the Federal Constitutional Court are selected from among the judges sitting on the court, alternately, one being selected by the Bundesrat and the other by the Bundestag. Finally, the judges who are selected by both houses are appointed ceremonially by the president of the country, who is not the head of the executive branch.<sup>61</sup>

The legislative houses may, at their discretion, select any candidate who is qualified to be a judge. However, by law, the Federal Ministry of Justice and Consumer Protection (which is controlled by the minister of justice) maintains a database of names of relevant candidates for a judicial post in the Federal Constitutional Court and submits this database **as a nonbinding recommendation** to the selecting bodies at least one week prior to the commencement of the selection process.<sup>62</sup> The database consists of two lists: one that is formulated by the Ministry of Justice and Consumer Protection at its initiative and the other that comprises names that the parties in the Bundestag, the Federal Government, and the governments of the various states included in the Federation propose to the Ministry.<sup>63</sup> If, after two months have passed from when a seat has been vacated, a judge has not yet been selected to fill it, the judges of the Federal Constitutional Court themselves join the process and recommend three candidates to the Bundestag or the Bundesrat for the post (according to the position that is open).<sup>64</sup> We must emphasize that both of the legislative bodies as well as the Bundestag committee **are not restricted to said lists and may select judges whose names are not included in them.**

60 Law Code of the Federal Constitutional Court art. 5-7 (Germany).

61 Law Code of the Federal Constitutional Court art. 10 (Germany).

62 Law Code of the Federal Constitutional Court art. 8 (Germany).

63 *Id.*

64 Law Code of the Federal Constitutional Court art. 7A (Germany). If there is more than one position that needs to be filled, the judges of the Federal Constitutional Court must suggest twice the number of candidates as the number of vacant positions. The list must receive the approval of the Federal Constitutional Court's plenum by an ordinary majority.

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Three by the president of the Republic (head of the executive branch), three by the president of the Senate, and three by the president of the National Assembly; all with parliamentary approval
<b>Additional Details</b>	Additionally, former presidents of the Republic serve on the court (Constitutional Council) based on their position
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

The constitutional court in France is called the "Constitutional Council." Until a few years ago, it only had the authority to halt unconstitutional bills before they were finally enacted into law. However, in 2010, it was given the added authority to overturn primary parliamentary legislation even after it takes effect.<sup>65</sup> The Constitutional Council is made up of past presidents of the Republic (who serve for life as long as they wish) as well as nine additional members who serve for one nine-year term.<sup>66</sup> Every three years, three of the additional members are elected: One by the president of the Republic (head of the executive branch), another by the president of the National Assembly (the lower house of the French parliament), and the third by the president of the Senate. The president of the Constitutional Council is elected exclusively by the president of the French Republic from among the members of the Council (either from the appointees or past presidents of the Republic).<sup>67</sup> Even those who are not jurists may serve on the Council.

In 2008, a constitutional amendment took effect<sup>68</sup> pursuant to which all of the of described judicial appointments require the approval of both parliamentary houses such that in each of the houses of parliament, appointments will be confirmed before a parliamentary committee acting thereunder and, in relation to the selection of the president of the Constitutional Council — before both committees in a joint session.<sup>69</sup> An appointment will be rejected by parliament if the total votes against the appointment in the relevant parliamentary committee (and in the case of the appointment of the president of the Constitutional Council, in the two parliamentary committees in a joint session) stands at 60% of the total votes cast. Candidates are subjected to a brief hearing at the time of their confirmation by the parliamentary committees.<sup>70</sup>

65 1958 CONST. arts. 1-61 (France).

66 1958 CONST. art. 56 (France).

67 *Id.*; Constitutional Council Act art. 1 (France), available (in French) at <https://tinyurl.com/y2bou4p9>.

68 Constitutional Amendment No. 2008-724 Regarding the Modernization of the Institutions of the Fifth French Republic (France), available (in French) at [www.senat.fr/dossier-legislatif/pj107-365.html](http://www.senat.fr/dossier-legislatif/pj107-365.html).

69 1958 CONST. arts. 13, 56 (France).

70 *See, e.g.*, the minutes of the decision by the Senate committee to confirm the appointment of Judge Dominique Lottin, available (in French) at <http://www.senat.fr/compte-rendu-commissions/20171023/lois.html>.



## Canada

Type of Court	Supreme
Authority to Overturn Statutes	Yes; there is an override clause
Judicial Declaration of a Constitution	No
Method of Selection	The prime minister (head of the executive branch), based on the nonbinding advice of the Queen's Privy Council for Canada
Additional Details	Ceremonial appointment by the governor general
Term	Up until age 75
Elected Public Officials Decide	Yes
Involvement by Jurists	A customary nonbinding recommendation

The Supreme Court of Canada has the power to overturn primary legislation,<sup>71</sup> but, pursuant to Article 33 of the country's constitution, the parliament retains the right to enact laws (on most subjects) in a manner that will prevent them from being overridden by the Court (this article is referred to as the "notwithstanding clause."). The Court consists of eight justices and a chief justice. By law, three of the nine justices must come from the province of Québec. As a precondition to serving on the Supreme Court, a justice must first have served as a judge in a state superior court or be an admitted member of the bar for at least 10 years.

In August 2016, a process was first established by which, when a position opens up on the Supreme Court, a dedicated, independent, nonpartisan advisory board, consisting of seven members, is formed.<sup>72</sup> The committee must provide the minister of justice and through him, to the prime minister, a **nonbinding** recommendation for appointment that includes the names of three to five candidates for each judicial vacancy. According to this procedure, three of the members of the committee (including the chair) are selected by the minister of justice, and at least two of them must have no legal background. The remaining four members — a retired judge, two lawyers, and a legal scholar — are nominated by independent professional legal organizations (the Canadian Judicial Council, the Canadian Bar Association, the Federation of Law Societies of Canada, and the Council of Canadian Law Deans, respectively).<sup>73</sup> The above advisory board has been formed twice up until now, in 2016 and 2017, and in both cases, former Prime Minister Kim Campbell headed it. Recently, in 2019, when a position reserved for residents of Québec opened up on the Supreme Court, it was decided that the existing process would be modified in order to properly reflect the impact of the continental legal tradition on the system of law practiced in the province. Therefore, it was resolved that whenever a Québec-dedicated vacancy occurred, the composition of the panel would be slightly changed. From among the eight members of the new board, two are selected by the federal minister of justice (including the chair — a position again held on that occasion by former Prime Minister Campbell), two are selected by the Québec minister of justice (at least one

71 See, e.g., *Vriend v. Alberta*, 1 S.C.R. 493 (1998).

72 See the notice by Canadian Prime Minister Justin Trudeau dated August 2, 2016 on the Canadian Prime Minister's website at <https://tinyurl.com/y6mzcjq2>. See the notice by Canadian Prime Minister Justin Trudeau Spokesperson's office dated July 17, 2017 on the Canadian Prime Minister's website at: <https://tinyurl.com/y4hkky47>.

73 Notice by the Prime Minister of Canada Justin Trudeau dated August 2, 2016, at <https://tinyurl.com/y6mzcjq2>; see also Peter H. Russell, *Selecting Supreme Court Justices: Is Trudeau's Sunny Way a Better Way*, 68 U.N.B.L.J. 3, 13 (2017).

of whom is not a lawyer), and the identities of the remaining four—a retired judge from a superior court of Québec or from the Supreme Court of Canada, two lawyers, and a legal scholar—are determined, respectively, by the Canadian Judicial Council, the Barreau du Québec, the Canadian Bar Association—Québec Division, and the Deans of the Québec Law faculties and of the Civil Law Section of the University of Ottawa's Faculty of Law.<sup>74</sup>

We emphasize that the advisory board's activities are regulated at the governmental level only, and it is not codified in the country's primary legislation or constitution. The current procedure puts an emphasis on transparency, and every advisory board submits a detailed report on how it carried out its mandate. Any Canadian law or judge who meets the above threshold conditions may submit her candidacy for the position.

Each board provides its list of recommended candidates' names to the minister of justice, who in turn hands it over to the prime minister together with his or her recommendation. Prior to formulating her recommendation, the minister of justice must first consult with the chief justice of the Supreme Court of Canada, relevant attorneys from the various provinces and territories, relevant cabinet ministers, as well as members of the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs. Once the prime minister receives the board's and the minister of justice's recommendations, she selects the candidate who will be appointed and summons her to a formal meeting before the parliamentary committees that advise the minister of justice (This is not a process designed to confirm the prime minister's selection, similar to the procedure in the US, but rather a hearing whose main purpose is to maintain the transparency of the process.). As we have noted, the prime minister is not restricted to the recommendations of the committee or the minister of justice and may select a candidate who has not received the support of these advisory entities, including even a candidate who does not appear at all on the list that the advisory board prepares.<sup>75</sup> The appointed justice's term ends when she reaches the age of 75.<sup>76</sup>

74 Additional details about the new advisory board and its predecessors may be found at <https://tinyurl.com/yyqrrgsy>.

75 *Id.*

76 Supreme Court Act art. 9 (2) (Canada).



## Australia

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The prime minister (head of the executive branch), at the recommendation of the minister of justice
Additional Details	Ceremonial appointment by the governor general
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	A customary nonbinding recommendation

The High Court of Australia (the name of that country's supreme court) has the power to overturn the parliament's primary legislation for non-conformance to the constitution.<sup>77</sup> The country's governor general (a representative of the British monarchy) ceremonially appoints the seven justices on the court.<sup>78</sup> In practice, the government of Australia selects the candidate who will be appointed. Officially, the prime minister (head of the executive branch) proposes the name of the candidate after consulting with the cabinet ministers and in particular, with the Australian attorney general. With that, in practice, the attorney general makes the decision as to the identity of the candidates.<sup>79</sup> An appointed High Court of Australia justice's term ends when she reaches the age of 70.<sup>80</sup>

Prior to deciding upon the identity of the candidate who will be presented to the government, the attorney general is required, by law, to consult with the justice ministers of the states and territories comprising the Australian Federation.<sup>81</sup> Additionally, the attorney general customarily consults with additional entities, including judges, bar associations, and academics.<sup>82</sup> Nevertheless, we emphasize that the minister **is not obligated** to take these recommendations into consideration and in practice, the selection of one candidate or another is considered a clearly political issue.<sup>83</sup> In 2009, the Australian Senate established an exploratory committee to review the country's legal system including the High Court of Australia's judicial selection and appointment process. The committee's conclusion was that the appointment process should not be changed and all authority in the matter should remain in the hands of the executive branch.<sup>84</sup>

77 AUSTRALIAN CONSTITUTION arts. 75-76. Similarly, see the description on the High Court of Australia's at [www.hcourt.gov.au/about/role-of-the-high-court](http://www.hcourt.gov.au/about/role-of-the-high-court).

78 AUSTRALIAN CONSTITUTION art. 72(i).

79 LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE, INQUIRY INTO AUSTRALIA'S JUDICIAL SYSTEM AND THE ROLE OF JUDGES, para. 3.10 (2009), <https://tinyurl.com/y5k54xta> [hereinafter AUSTRALIAN SENATE REPORT].

80 AUSTRALIAN CONSTITUTION art. 72.

81 *High Court of Australia Act* arts. 5-6 (Australia), at <https://tinyurl.com/y6emkjpj>.

82 AUSTRALIAN SENATE REPORT, *supra* note 80, at 12.

83 Rachel David & George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 Melbourne U. L. Rev 819, 821 (2003).

84 The conclusions of the AUSTRALIAN SENATE REPORT may be found on the Australian parliament's website at <https://tinyurl.com/yyumjyfh>.



## New Zealand

Type of Court	Supreme
Authority to Overturn Statutes	No
Judicial Declaration of a Constitution	No
Method of Selection	The minister of justice
Additional Details	Ceremonial appointment by the governor general
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	A customary nonbinding recommendation

The New Zealand Supreme Court, like the other courts in that country, is not authorized to overturn primary legislation.<sup>85</sup> The country's five Supreme Court justices are selected by the attorney general and in the case of the chief justice, by the prime minister (the head of the executive branch). They are all ceremonially appointed by the country's governor general (representative of the British monarchy).<sup>86</sup> Prior to selecting a candidate, the attorney general customarily consults the chief justice of the Supreme Court and the solicitor general. However, this custom does not have any statutory source, and their opinions **are not binding**. Additionally, it is common for the attorney general, despite being a political player, to eschew considering political factors when selecting the candidates.<sup>87</sup> Generally, judges are selected to the Supreme Court from among those actively serving on the country's senior courts (which are subordinate to the Supreme Court), viz — the High Court and the Court of Appeal.<sup>88</sup> An appointed Supreme Court justice's term ends when she reaches the age of 70.<sup>89</sup>

85 Senior Courts Act 2016 art. 3(2), at <https://tinyurl.com/yxqg98ht>; Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Colum. J. Trans. L. 285, 292-293 (2014).

86 Senior Courts Act 2016 art. 100 (New Zealand). See also the description on the courts of New Zealand website at <https://tinyurl.com/y4bv77a>. Despite the fact that there is no defined procedure, it appears that the prime minister is the one who indeed has the final say in the selection of the chief justice of the Supreme Court and does not limit himself or herself to the recommendations of the attorney general or of any other entity. Thus it appears from the response of Prof. Janet McLean, expert in public law, to the Kohelet Forum's questions dated November 21, 2018.

87 *Id.*

88 Philip A. Joseph, *Appointment, Discipline and Removal of Judges in New Zealand*, in *Judiciaries in Comparative Perspective* 66, 69 (H.P. Lee ed., 2011).

89 Senior Courts Act 2016 art. 133 (New Zealand).



## Japan

<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The executive branch (with periodic approval by public referendum)
<b>Additional Details</b>	Ceremonial appointment by the emperor
<b>Term</b>	Up until age 70 (with the option to renew every 10 years, subject to re-approval by public referendum)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	Chief justice — A customary nonbinding recommendation; remaining justices — none

The Japanese Supreme Court is authorized to engage in constitutional review of primary legislation.<sup>90</sup> The Court comprises 14 associate justices and is headed by a chief justice. The minimum age to serve on the Court is 40, and in addition, 10 of the justices must meet one of the following conditions in terms of experience: served as president of the High Court (without the need for a minimum amount of experience); served as a judge in a lower court (for at least 10 years); or has a background as a professor of law, an attorney, or as a public prosecutor (for at least 20 years). The above minimum periods of time are shortened by half if the candidate served in one of a line of positions set forth in the law — primarily positions that are comparable to paralegal apprentice positions.<sup>91</sup>

The chief justice of the Supreme Court is selected by the government of Japan and is in fact appointed by the emperor (the latter has a ceremonial role only).<sup>92</sup> The judges on the country's remaining courts are selected and appointed by the government with the ceremonial approval of the emperor (which is always given).<sup>93</sup> Additionally, a Supreme Court associate justice's continued service is subject to a **public referendum** (retention election) in the first general election following that justice's appointment as well as in the general elections that are held every 10 years thereafter (rounded) — until she retires.<sup>94</sup> The public referendum is held using an opt-out format, according to which the default is that the judge remains in his or her position, and only if the majority of voters participating in the general elections actively vote to remove the judge, will his or her tenure be terminated.<sup>95</sup> Notably, in fact, up until now, no judge has had his or her term shortened as the result of such public referendum, but this is primarily because, for the most part, Supreme Court justices in Japan retire earlier than 10 years following their appointment.<sup>96</sup>

90 Nihonkoku Kenpō [Kenpō] [Constitution], art. 81, at <https://tinyurl.com/ysp6vuhn>.

91 Court Act (Japan) art. 41, at <https://tinyurl.com/y57gvog6>.

92 Nihonkoku Kenpō [Kenpō] [Constitution], art. 6.

93 Nihonkoku Kenpō [Kenpō] [Constitution], arts. 7, 79.

94 *Id.*

95 Colin P.A. Jones, *At the Polls, a Sweep for Abe and a Rubber Stamp for Japan's Supreme Court Judges*, JAPAN TIMES, Nov. 5, 2017, <https://tinyurl.com/y8g4a6wr>.

96 *Id.*

Even though the selection of the chief justice of the Supreme Court is given by law to the Cabinet of Japan, it is customary for the cabinet to consult with the outgoing chief justice of the Supreme Court as to the identity of his or her replacement, and the chief justice's recommendation is generally accepted.<sup>97</sup> Similarly, over the years, unofficial practices have developed in the selection of these justices, such as the custom of selecting seven justices who are not from among the judiciary.<sup>98</sup>

97 *Change at the Top Court's Helm*, JAPAN TIMES, March 17, 2014, <https://tinyurl.com/y6jvxf3r>.

98 It is customary to appoint candidates for the position of associate justice on the Supreme Court as follows: Six judges, four lawyers in private practice, two former public prosecutors, one legal academic, and two jurists who are bureaucrats (for the most part, one of them from the Ministry of Foreign Affairs). For additional details, see Colin P.A. Jones, *supra* note 96..





## Belgium

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The legislative branch, in collaboration with the executive branch
Additional Details	Ceremonial appointment by the king; <b>half of the judges are former politicians</b>
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	No

The 12 judges on the Constitutional Court of Belgium, which is authorized to engage in constitutional review of the country's laws,<sup>99</sup> are selected by the government of Belgium from a list of two candidates for each vacancy. For each such position, one candidate is proposed by the Senate, and one candidate is proposed by the Chamber of Representatives (in both cases, by a special majority of two-thirds of the members who are present). After their selection, the judges are ceremonially appointed by the king of Belgium.<sup>100</sup> By law, one-half of the judges must speak Flemish (Belgian Dutch), and the other half must speak French (where one of the judges must be knowledgeable in German). Additionally, candidates must be at least 40 years old. Finally, half of the judges must have served at least five years in one of the following positions: as a judge on one of the country's civil, criminal, or administrative courts; as a prosecutor in one of the country's prosecutor's offices; as a law clerk in the Constitutional Court; or a professor of law at a recognized university in Belgium. The remaining judges must have served for at least five years as elected public officials in one of the country's parliamentary houses.<sup>101</sup>

In practice and as a matter of custom, the seats on the Constitutional Court are distributed among the various parliamentary parties according to the political power balances struck between them using a method of calculation known as the "Dhondt system."<sup>102</sup> Thus, at any given time, the composition of the Constitutional Court reflects the relative make up of political powers in the country. An appointed Constitutional Court's judge's term ends when she reaches the age of 70.<sup>103</sup>

99 CONST. art. 142 (Belgium), <https://tinyurl.com/yxdmg6a6>; Constitutional Court Act art. 1 (Belgium), at <https://tinyurl.com/yxyyadtj>.

100 Constitutional Court Act arts. 31-32 (Belgium). See also the description on the Belgian Constitutional Court website at <https://tinyurl.com/y4ms8wfs>.

101 Constitutional Court Act art. 34 (Belgium).

102 The Dhondt system is a method of calculation that distributes the surplus votes according to the sizes of the various parties. For more information on the subject of the "Dhondt system," see the description at <https://tinyurl.com/y2kty4gy>.

103 EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), THE COMPOSITION OF CONSTITUTIONAL COURTS 12 (1997), <https://tinyurl.com/y57omndb>.



## Switzerland

Type of Court	Supreme
Authority to Overturn Statutes	No
Judicial Declaration of a Constitution	No
Method of Selection	The legislative branch
Additional Details	—
Term	Six years (renewable), only until age 68
Elected Public Officials Decide	Yes
Involvement by Jurists	No

The Swiss Federal Supreme Court, like the other courts in Switzerland, is not authorized to overturn primary legislation.<sup>104</sup> The Court comprises 38 permanent sitting justices. The justice's term is fixed at six years, but it may be renewed as long as the justice has not reached the age of 68.<sup>105</sup> There are no preconditions to serving as a justice on the Supreme Court, and there is no obligation to appoint jurists to the position.<sup>106</sup>

The justices of the Federal Supreme Court are selected by an ordinary majority by the two houses of the legislature, jointly referred to as the "United Federal Assembly,"<sup>107</sup> based on the recommendation of a legislative committee.<sup>108</sup> The committee comprises 17 members, all members of the United Federal Assembly, who are divided in a manner that represents the balance of political power in the Assembly.<sup>109</sup> In 2001, during the course of deliberations on regulating the process by which the Supreme Court justices are selected (culminating in the establishment of the legislative committee), a proposal was also made pursuant to which justices would be appointed based on the recommendation of a professional commission. This proposal was rejected, first and foremost based on the assertion that it would result in severe harm to the principle of separation of powers.<sup>110</sup>

104 BUNDESVERFASSUNG [BV][CONSTITUTION] art. 189(4), <https://tinyurl.com/y2vukx3j>.

105 Federal Court Law art. 9 (Switzerland), available (in French) at <https://tinyurl.com/yxgy2u9f>.

106 Federal Court Law art. 5(2) (Switzerland).

107 BUNDESVERFASSUNG [BV][CONSTITUTION] art. 168(1); Federal Court Law art. 5(1) (Switzerland).

108 Federal Assembly Act §40A (Switzerland), available (in German) at <https://tinyurl.com/y3ksmp43>. For more information, see the Swiss Federal Assembly website at: <https://tinyurl.com/y2lhfnah>.

109 Benjamin Suter, Appointment, *Discipline and Removal of Judges: a Comparison of the Swiss and New Zealand Judiciaries*, 5 VUWLR 268, 280-281 (2014).

110 *Id.* at 282. Minutes of the discussion are available at the Swiss Federal Assembly website, available (in German and French) at <https://tinyurl.com/y552728c>.



## Austria

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Eleven by the executive branch and nine by the parliamentary houses
<b>Additional Details</b>	Ceremonial appointment by the president of the country (who is not the head of the executive branch)
<b>Term</b>	Up until age 70
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

In Austria, there is a Constitutional Court that has the power to overturn primary legislation that violates the provisions of the Constitution.<sup>111</sup> The Court is composed of 20 justices (14 regular justices and six substitute justices).<sup>112</sup> The qualifications for service on the Court are an academic degree in law and at least 10 years' experience working in a profession that requires such a degree.<sup>113</sup> The president of the court, the vice president, six of the serving justices, and three of the substitute justices are selected by the cabinet from among the members of the judiciary, career civil servants, or legal university professors. The remaining justices are selected by an ordinary majority of the legislative houses: three serving justices and two substitute justices by the National Council and three serving justices and one substitute justice by the Federal Council.<sup>114</sup> In practice, these candidates represent a relatively balanced distribution between the country's two central political parties. A justice's term continues until the end of the calendar year in which she reaches the age of 70.<sup>115</sup> The ceremonial appointment is made by the country's president, who is not the head of the executive branch.<sup>116</sup>

111 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] arts. 137-139, <https://tinyurl.com/y3fw8ud4>. See also the Austrian Constitutional Court website at <https://tinyurl.com/y5d2w3zx>.

112 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] art. 147; Constitutional Court Act 1953 art. 1 (Austria), at <https://tinyurl.com/y6z8vx46>.

113 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] art. 147(3).

114 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] art. 147(2).

115 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] art. 147(6). See also the description on the Austrian Constitutional Court website at <https://tinyurl.com/y4fd6bxo>.

116 BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] art. 147(2).



## Mexico

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The president of the country (head of the executive branch), generally in collaboration with the Senate
Additional Details	—
Term	Fifteen years (nonrenewable)
Elected Public Officials Decide	Yes
Involvement by Jurists	No

The Mexican Supreme Court is authorized to engage in constitutional judicial review of the Congress' laws.<sup>117</sup> The eleven Supreme Court magistrates serve in the position for a one-time term of 15 years.<sup>118</sup> Candidates for vacancies on the court must be 35 years of age or older and must have held a degree in law for at least 10 years. They are prohibited from serving in a political position during the year prior to their appointment.<sup>119</sup>

The president of Mexico (head of the executive branch) puts together a list of three candidates for each judicial vacancy on the Supreme Court. The president presents the list to the Senate, which then holds hearings for each of the candidates and selects the magistrate to be appointed from among them by a special majority of two-thirds of the members present within 30 days. If a decision is not made within this time period, the country's president then selects the candidate who will be appointed from the list that was submitted to the Senate. If the Senate rejects all of the candidates on the list, the president must compile a new list consisting of three names and present that list to the Senate as well. If the Senate rejects the new list, the president will select the candidate that she sees fit, **whether or not that candidate's name appeared on any of those lists**.<sup>120</sup> The magistrates of the Supreme Court select their president from among themselves for a tenure of four years.<sup>121</sup>

117 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 105, <https://tinyurl.com/y3c4o4h9>. For more on the subject, see: Andrea Castagnola & Saúl López Noriega, *The Supreme Court and the (no) Rights Revolution: an Empirical Analysis of the Court's Rulings from 2000-2017*, in JUDICIAL POLITICS IN MEXICO: THE SUPREME COURT AND THE TRANSITION TO DEMOCRACY 95 (Andrea Castagnola & Saúl López Noriega eds., 2017).

118 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

119 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 95.

120 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 96.

121 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 97.



## Czech Republic

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The president of the country (who is not the head of the executive branch but is elected through general elections) with approval of the Senate
<b>Additional Details</b>	—
<b>Term</b>	Ten years (renewable)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

The Czech Constitutional Court has the power to overturn legislation that violates the Constitution<sup>122</sup> but only with the agreement of nine of the justices who are present.<sup>123</sup> The Court comprises 15 justices who serve for 10-year renewable terms. The justices must have an academic legal education, be qualified to be selected to the Senate, and have at least 10 years' experience in the legal profession.<sup>124</sup> The selection of the justices is made by the president of the Republic (who is not the head of the executive branch but holds real governmental powers)<sup>125</sup> with the approval of the Senate by an ordinary majority.<sup>126</sup> The Senate reviews the selection through various legislative committees, and its conclusions are presented to the Senate plenum during a hearing at which the candidate is also present.<sup>127</sup>

122 CONSTITUTION OF THE CZECH REPUBLIC art. 87 [www.psp.cz/en/docs/laws/constitution.html](http://www.psp.cz/en/docs/laws/constitution.html).

123 Constitutional Court Act §13 (Czech Republic), at <https://tinyurl.com/y6hxlomf>.

124 CONSTITUTION OF THE CZECH REPUBLIC art. 84(3).

125 The power structure in the Czech Republic is semi-presidential (meaning, based on a division of governing powers between the president and the prime minister). It is possible that this was the result of the tremendous stature of Václav Havel, the country's first president, who in practice turned the position from a symbolic role to one with certain, actual powers. Thus, pursuant to Article 50 of the Constitution of the Czech Republic, the president (who is today elected directly) has the power to veto ordinary legislation or refuse to sign it and remand it for deliberation by the legislature (which can reenact it by an ordinary majority and in so doing, require the president to approve it). The president's additional real powers include the power to disperse the Chamber of Deputies (under the circumstances set forth in the Constitution) as well as the power to appoint justices to the Constitutional Court (with approval of the Senate).

126 CONSTITUTION OF THE CZECH REPUBLIC art. 84(2) Constitutional Court Act art. 6 (Czech Republic). See also the description on the Czech Republic's Constitutional Court website at <https://tinyurl.com/y6qacqmv>

127 *Id.*



## Hungary

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The legislative branch
Additional Details	—
Term	Twelve years (nonrenewable) or until the age of 70
Elected Public Officials Decide	Yes
Involvement by Jurists	No

The Hungarian Constitutional Court, which is empowered to engage in constitutional review of the country's laws,<sup>128</sup> consists of 15 justices who serve for one-time 12-year term<sup>129</sup> but who retire at the age of 70, even prior to the conclusion of the term.<sup>130</sup> Justices must be at least 45 years of age, hold a degree in law, and have a background as law professors at a university or professional work experience of at least 20 years in law.<sup>131</sup>

A dedicated parliamentary committee, which comprises nine to 15 members of parliament who are appointed based on a party index that corresponds to the distribution of power in the parliamentary plenum, recommends the name of a candidate and sends it to the plenum. Additionally, prior to deliberations on the appointment, the candidate must undergo a hearing before an additional parliamentary committee — the standing committee on constitutional matters. Once the name of a candidate has been provided to the plenum together with the recommendation of the committee on constitutional affairs, the parliament may confirm the appointment by an absolute majority of two-thirds of the members of parliament.<sup>132</sup> Similarly, the parliament selects the president of the Constitutional Court by an identical majority from among the serving court members.<sup>133</sup>

128 Act on the Constitutional Court arts. 23-26 (Hungary), at <https://hunconcourt.hu/act-on-the-cc>.

129 MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. 24(8) at <https://tinyurl.com/y3hkyah5>; Act on the Constitutional Court art. 6(3) (Hungary).

130 See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), THE COMPOSITION OF CONSTITUTIONAL COURTS, *supra* note 104.

131 Act on the Constitutional Court art. 6 (Hungary).

132 Act on the Constitutional Court arts. 7-8 (Hungary); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. 24(8).

133 *Id.*



## Slovakia

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The legislature, in collaboration with the president of the country (who is not the head of the executive branch but is elected through general elections)
<b>Additional Details</b>	—
<b>Term</b>	Twelve years (renewable)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

The Slovak Constitutional Court is empowered to engage in constitutional review of the country's laws.<sup>134</sup> The president of the country selects the 13 members of the Constitutional Court for renewable terms of 12 years. Judges must be 40 years of age or more, eligible to be elected to the National Assembly, and hold a degree in law and have at least 15 years' experience in the legal profession.<sup>135</sup>

The president (who is not the head of the executive branch but has actual power in the matter) selects the judges from a list of two candidates for each judicial vacancy that the legislature compiles by an ordinary majority.<sup>136</sup> Recently, during the course of the previous president's term, passionate public controversy erupted regarding the question of whether the president is permitted to select a candidate who was not included in the legislature's proposal. The Constitutional Court itself decided the question in a ruling in 2016.<sup>137</sup> In its decision, the Court held that the mechanism for selecting judges set forth in the Constitution is exhaustive and that the president is obligated to select one of the candidates proposed by the legislature.<sup>138</sup>

134 SLOVAK CONSTITUTION art. 125 available (in Slovakian) at [www.zakonypreludi.sk/zz/1992-460](http://www.zakonypreludi.sk/zz/1992-460).

135 SLOVAK CONSTITUTION art. 134.

136 *Id.*

137 Nález I. ÚS 575/2016. For a review of the decision, see <https://tinyurl.com/yxuuhsj4>.

138 *Id.*



## Slovenia

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The president of the country (who is not the head of the executive branch but is elected through general elections) in collaboration with the legislature
<b>Additional Details</b>	—
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

The Slovenian Constitutional Court is authorized to engage in constitutional review of the country's laws.<sup>139</sup> It comprises nine members,<sup>140</sup> who are selected for one-time nine-year terms by the National Assembly (the legislature) by an absolute majority of its members and based on the recommendation of the country's president (who is not the head of the executive branch but is elected to the position through general elections).<sup>141</sup> The president can recommend more than one candidate. In such case, the candidate who receives the most votes during the legislative vote is appointed to the position.<sup>142</sup> Candidates are required to be 40 years of age or older and must have notable legal training. The judges of the Constitutional Court select its president from among themselves for a term of three years by secret ballot.<sup>143</sup>

139 SLOVENIAN CONSTITUTION art. 160, available at: [www.us-rs.si/media/constitution.pdf](http://www.us-rs.si/media/constitution.pdf).

140 SLOVENIAN CONSTITUTION art. 163.

141 SLOVENIAN CONSTITUTION art 165.

142 Constitutional Court Act arts. 13 and 14 (Slovenia), at: [www.us-rs.si/media/the.constitutional.court.act-zusts.pdf](http://www.us-rs.si/media/the.constitutional.court.act-zusts.pdf).

143 Constitutional Court Act art. 10 (Slovenia); SLOVENIAN CONSTITUTION art. 163.





## Poland

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The legislative branch
<b>Additional Details</b>	The country is in the middle of a severe constitutional crisis
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	No

The Polish Constitution expressly states that the Constitutional Tribunal has the power to review the constitutionality of the country's laws.<sup>144</sup> However, an actual exact description of the Court's powers as well as its status and the process for selecting its membership are not simple issues in any way, shape, or form. That is because Poland is, at this very moment, in the throes of a significant constitutional crisis that relates to the process of selecting the members of the Constitutional Tribunal as well as the standing of the entire legal system in the framework of the balance of powers between the country's governmental branches.

Pursuant to the Constitution, the Polish house of representatives, referred to as the "Sejm," is the entity empowered to select the 15 judges who sit on the Constitutional Tribunal, by an absolute majority,<sup>145</sup> for one-time terms of nine years.<sup>146</sup> Conversely, the president of the country (who is not the head of the executive branch but is elected through general elections) selects the president and vice president of the Constitutional Tribunal from a list that is put together by the judges of the Constitutional Tribunal themselves.<sup>147</sup> All of the judges are sworn into office by the country's president, and it is the status of the latter that is at the heart of the current constitutional crisis. The qualifications for service on the Constitutional Tribunal are identical to the qualifications for service on the Polish Supreme Court: The candidate must be at least 40 years of age, hold a graduate degree in law, and demonstrate experience of at least 10 years as a judge, prosecutor, or private attorney. Alternatively, a professor or doctor of law employed by one of the country's academic institutions may be appointed, even if she does not meet the above requirements.<sup>148</sup>

144 POLISH CONSTITUTION art. 188, at [www.sejm.gov.pl/prawo/konst/angielski/koni.htm](http://www.sejm.gov.pl/prawo/konst/angielski/koni.htm).

145 Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal art. 2(2) (Poland), at <https://tinyurl.com/yykxtac>; Standing Orders of the Sejm of the Republic of Poland arts. 26, 31, at <https://tinyurl.com/y68pjhib>.

146 POLISH CONSTITUTION art. 194(1).

147 POLISH CONSTITUTION art.194(2).

148 Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal art. 3 (Poland); Act on the Supreme Court art. 30 (Poland), available (in Polish) at: <https://tinyurl.com/y37xfb7u>. These requirements were already in place prior to the start of the current constitutional crisis; see Act on the Constitutional Tribunal art. 18 (Poland) in its previous version, dated June 25, 2015, at <https://tinyurl.com/y4xaoa3m>.

The background to the current constitutional crisis involves the political struggle between the country's two largest political parties, the "Civic Platform Party" and the "Law and Justice Party."<sup>149</sup> It began in 2015, at the start of which the Civic Platform Party controlled all of the country's power centers. Its representatives held the post of prime minister as well as president and constituted a majority in both chambers of the legislature. During the course of that same year, five of the Constitutional Tribunal's judges were slated to finish their terms. Three of these judicial seats were expected to be vacated during the course of the outgoing seventh Sejm, and two of them were expected to be vacated after the swearing-in of the incoming eighth Sejm.

In May, the Law and Justice Party's candidate won the presidential elections. In June, the seventh Sejm enacted an amendment to the Act on the Constitutional Tribunal<sup>150</sup> that enabled it (meaning, the Civic Platform Party whose members held the majority) to appoint judges **to all five judicial vacancies**, including those that were supposed to fall under the incoming Sejm's responsibility. In July, approximately two months prior to the Law and Justice Party's representative taking up office as the country's president, the outgoing president (a member of the Civic Platform Party) signed the law, and it took effect at the end of August. At the beginning of October, the seventh Sejm exercised its new power and selected five judges who would begin their terms and fill the vacancies on the Constitutional Tribunal. However, at the end of that same month, general elections were held for the Sejm as well as the Senate. The Civic Platform Party lost both houses of the legislature to its rival, the Law and Justice Party, which in turn declared that the amendment to the Act on the Constitutional Tribunal is unconstitutional and as a result, the appointments by the seventh Sejm are invalid. In their place, in December, the eighth Sejm (meaning, the Law and Justice Party that now held a majority) selected five new judges to fill the vacancies.

The country's president who, as previously noted, was also a member of the new ruling party, declared that he would not appoint the judges selected by the outgoing Sejm but rather those selected by the incoming Sejm. Up until that time, it had been customary to view the appointment power of the country's president as purely ceremonial. Now, the new president claimed that as long as he had not sworn in the judges, they are nothing more than "candidates expecting to be appointed" (meaning, that his power regarding the appointment was real and that he did not have an obligation to appoint the candidates whom the seventh Sejm had selected). In response to a petition filed with the Constitutional Tribunal against the amendment to the law and against the appointments, the Court ruled that the appointments by the seventh Sejm regarding the three vacancies that opened up during the course of its term were properly made and that the two other appointments are illegal. Nevertheless, the incoming government and president, members of the Law and Justice Party, refused to accept the Court's ruling and claimed that they had the power to appoint judges to all five vacancies. A petition against this decision that was filed with the Constitutional Tribunal was granted in a ruling that additionally held that the power of the country's president to swear in the appointed judges is strictly ceremonial and that he does not have any discretion in the matter. In response, the government announced that it refused to publish the judgment and in so doing, prevented it from taking effect.<sup>151</sup>

149 The description of the crisis in this chapter is synoptic and naturally, non-exhaustive. For a more detailed review that also expands upon the response by various other entities to those developments, see Małgorzata Szuleka, Marcin Wolny & Marcin Szwed, *The Constitutional Crisis in Poland 2015-2016* (2016), <https://tinyurl.com/y4dsj7ek>; Marek Zubik, *A.D. 2015/2016: Anni Horribili of the Constitutional Tribunal in Poland*, ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS (December 5, 2016), <https://tinyurl.com/yx8mwzpw>.

150 The language of the Act on the Constitutional Tribunal (Poland) in its previous version, dated June 25, 2015, may be found, as noted, on the Polish Constitutional Tribunal's website at <https://tinyurl.com/y4xaoa3m>.

151 Later, the Polish parliament codified the president's authority in the appointment process into law; see Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal art. 5 (Poland).

As of that moment, a new species of struggle broke out in the country. In addition to the political dispute between the two largest parties in the legislature, there was now an institutional dispute between the political branches (the legislature, the president, and the government) on the one side and the Constitutional Tribunal and the judiciary on the other. During the course of this struggle, the legislature enacted a line of significant constitutional amendments intended to speed up the expiration of the tenure of the Constitutional Tribunal's president and vice president and, as a practical matter, grant the controlling party the power to select new judges to replace them through an expedited process. Similarly, the new legislation increased the minimum quorum required for the Constitutional Tribunal's deliberations to 13 judges and established that all of the Court's determinations must be made by an absolute majority of two-thirds of the sitting judges. The Constitutional Tribunal declared these amendments to be unconstitutional, but the government once again refused to publish the judgments in the official gazette, claiming that the Court had not convened pursuant to the provisions of the amended statute and therefore, its overturning of the statute itself was illegal. This dispute created a lack of clarity and generated confusion among the country's institutions, some of which relied on the Court's judgment despite it not having been published, while others acted pursuant to the amended legislation despite it having been overturned. Later, the legislature came to terms to some extent with the Court's judgments, amended the law, and removed the quorum and absolute majority requirements, and the government consented to publish the judgments that were the subject of the dispute.<sup>152</sup>

Thus, because the Polish president's status and powers, in the context of the process of selecting the Constitutional Tribunal's judges, are at the center of the constitutional crisis, it is not currently possible to define the prevailing law in Poland as to this issue with any certainty. Similarly, the status of the Constitutional Tribunal itself is unclear in light of the practice that the government has developed pursuant to which it is able to refrain from publishing the Court's judgments in its official gazette — a course of action that has, as a practical matter, reduced the Constitutional Tribunal to a mere advisory entity (similar to the model in place in England).

152 See Act on the Constitutional Court Act art. 106 (Poland) at <https://tinyurl.com/y3eofkhc>. The institutional dispute did not end there. During the course of 2017, the Law and Justice Party government, which viewed the judiciary as a stronghold of its opposition, continued to advance additional substantive legislative amendments. The focal point of the fight now moved to the National Council of the Judiciary, the entity responsible for selecting judges for various courts other than the Constitutional Tribunal. These legislative amendments gave more power to the parliamentary representatives on the Council (meaning, representatives of the governing party) and artificially shortened the tenure of the then sitting judges by lowering the retirement age. In practice, the government sought to accelerate the retirement of judges whom it had not appointed and had to replace them with judges who identified with the ruling party. The issue was brought before the European Court of Justice, which recently ruled that by its actions, Poland violated the provisions of the Treaty of the European Union (one of two of the foundational documents of the EU); see Case C-619/18, *European Comm'n v. Poland*, 2019 E.C.L.I 325, at <http://curia.europa.eu/juris/documents.jsf?num=C-619/18#>. Following the decision, the government of Poland backed-off from the actions that it had taken out of a concern over a confrontation with the EU authorities as well as other EU member states. However, even now, the power struggle has not ended, and senior members of the political system continue to hold on to some of the above-described positions. The country's president's actual authority in the process of appointing the Constitutional Tribunal's judges is today codified by statute (see Act on the Status of the Judges of the Constitutional Tribunal art. 5 (Poland)), but questions are still being voiced regarding the obligation to publish the Constitutional Tribunal's judgments. For a description of the latest developments in the crisis that Poland is undergoing, see Piotr Mikuli, *The Declining State of the Judiciary in Poland*, INT'L. CONST. L. BLOG (May 15, 2018), <https://tinyurl.com/y3yfk7wn>; Joanna Berendt & Marc Santora, *Poland Reverses Supreme Court Purge, Retreating From Conflict With E.U.*, N.Y. TIMES, December 17, 2018, <https://tinyurl.com/y46p3s3x>.



## Estonia

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The chief justice of the Supreme Court of Estonia is selected by the legislature according to a proposal that the country's president (who is not the head of the executive branch) provides. The legislature selects the remaining justices of the Supreme Court.
Additional Details	—
Term	Up until age 68
Elected Public Officials Decide	Yes
Involvement by Jurists	The chief justice of the Supreme Court — none; the remaining Supreme Court justices — a statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials

The Supreme Court of Estonia is composed of 19 justices. The Court includes a dedicated "chamber" for constitutional review that is composed of nine justices.<sup>153</sup> This chamber, which has the power to declare laws to be void<sup>154</sup>, is headed by the chief justice of the Supreme Court, who is selected for a term of nine years by the legislature, by an ordinary majority, based on the recommendation of the country's president (who is not the head of the executive branch). The legislature selects the remaining justices by an ordinary majority upon the recommendation of the chief justice of the Supreme Court (who is selected, as aforesaid, by the president and by the legislature).<sup>155</sup> In order to be appointed to serve on the Court, a candidate must hold a graduate degree in law.<sup>156</sup>

Prior to proposing a particular candidate, the chief justice of the Supreme Court customarily consults with the other justices of the Supreme Court as well as the administrator of the country's courts (these recommendations are **nonbinding**).<sup>157</sup> The recommendation of the chief justice of the Supreme Court **does not bind** the legislature. Indeed, the legislature holds a hearing for the candidate before the Constitution Committee.<sup>158</sup> Up until now, the legislature has been careful to

153 Courts Act (Estonia) art. 29(1), at <https://tinyurl.com/y363movc>; ESTONIAN CONSTITUTION art. 149, at <https://tinyurl.com/y2dvtybe>. It should be noted that even though this is a dedicated constitutional chamber that deals exclusively with constitutional petitions, we have chosen to treat this forum as a supreme court and not as a constitutional court because the justices who serve in the constitutional chamber also hear nonconstitutional cases in the framework of the Supreme Court's other chambers.

154 ESTONIAN CONSTITUTION art. 152.

155 ESTONIAN CONSTITUTION art. 150; Courts Act art. 27(1) (Estonia); Riigikogu Rules of Procedure and Internal Rules Act art. 78 (Estonia), at <https://tinyurl.com/y6nbo8zb>.

156 Courts Act art. 47 (Estonia).

157 Courts Act art. 55(4) (Estonia); the response by Ms. Karin Tuulik, the legal advisor to the Estonian legislature's Constitution Committee, to the Kohelet Forum's questions dated April 2, 2019.

158 Riigikogu Rules of Procedure and Internal Rules Act art. 117 (Estonia).

always appoint the candidate nominated by the chief justice of the Supreme Court. However, prior to choosing the candidate whom she will recommend, the chief justice is aware of the possibility that the legislature will reject the recommendation and is further in the practice of ascertaining the level of support for the candidate among the members of the Constitution Committee.<sup>159</sup> An appointed justice's term ends when she reaches the age of 68.<sup>160</sup>

159 The response by Ms. Karin Tuulik, the legal advisor to the Estonian legislature's Constitution Committee, to the Kohelet Forum's questions dated April 2, 2019.

160 Courts Act arts. 48, 99A (Estonia).



## Ireland

<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The executive branch
<b>Additional Details</b>	Ceremonial appointment by the president of the country (who is not the head of the executive branch). Proposed legislation on the reform of the judicial selection process was approved by the lower house of the Irish legislature and is currently before its senate.
<b>Term</b>	Up until age 70
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	For candidates who are judges — none For candidates who are not judges — statutory nonbinding recommendation

The Supreme Court of Ireland, which has one chief justice and nine members,<sup>161</sup> has the power to overturn the parliament's primary legislation.<sup>162</sup> Candidates for judicial vacancies on the Supreme Court must fall within one of the following categories: judges of high courts, judges on intermediate courts with at least two years' experience, or lawyers with at least 12 years' experience who have actively engaged in the practice of law for at least the two years preceding the appointment.<sup>163</sup> The Court's justices are selected by the government and are ceremonially appointment by the president of the country (who is not the head of the executive branch).<sup>164</sup> A justice's term ends when she reaches the age of 70.<sup>165</sup>

In 1995, an independent judicial advisory board was established whose role it is to nominate to the government candidates for appointment who are not sitting judges.<sup>166</sup> The board currently comprises 11 members: Five judges (the chief justice of the Supreme Court who serves as chair and four presidents of the lower courts), the attorney general, two attorneys (who are selected

161 In addition to the above, the presidents of two subordinate courts, the president of the Court of Appeal and the president of the High Court, sit on the Supreme Court *ex officio*. See, respectively, Article 1(3) of the Courts (Establishment and Constitution) Act 1961, at <https://tinyurl.com/y4t6epwr>, as well as Article 1A(4) of that same act, which was added in the framework of Court of Appeal Act, 2014 art. 6 (Ireland), available at <https://tinyurl.com/y5dvt6vm>.

162 IRISH CONSTITUTION 1937 arts. 34(3)(2), 34(4)(4)-34(4)(6), [www.irishstatutebook.ie/eli/cons/en/html](http://www.irishstatutebook.ie/eli/cons/en/html).

163 Courts (Supplemental Provisions) Act 1961 art. 5 at <https://tinyurl.com/yxtyv7y4>.

164 IRISH CONSTITUTION 1937 art. 35.

165 Courts and Court Officers Act 1995 art. 47 (Ireland), at <https://tinyurl.com/yzahlyrr>.

166 Although the board only officially addresses candidates who are not sitting judges, it is clear that any candidate who comes from the bench has passed through its hands prior to being appointed to his or her current position. See, e.g., the initial response by the Supreme Court of Ireland to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at: <https://tinyurl.com/ygxcb3q> [hereinafter Ireland's Responses to the Judicial Appointment Questionnaire].

by the country's law societies), and three representatives with no legal background who are selected by the minister of justice.<sup>167</sup> The board must recommend at least seven candidates to the minister of justice who are suitable for any judicial post, and if it is unable to do so, it must provide a detailed opinion regarding each candidate who was presented to the board and his or her suitability to the position.<sup>168</sup> Even though it is commonplace for the government to select candidates (who are not sitting judges) from among those who merited the board's approval, its recommendations are **nonbinding**, and the government may deviate from them as long as its decision is clearly published in the *Iris Oifigiúil* [official gazette].<sup>169</sup>

We noted that in May 2017, the government of Ireland submitted a bill intended to carry out additional reform in the country's judicial selection process and in the activities of the judicial appointments advisory board. According to the bill, a new advisory board would be established in place of the existing board that would make recommendations as to all judicial appointments (including those candidates who are sitting judges at the time that candidates are considered).<sup>170</sup> Similarly, the bill increases the number of representatives who are not jurists in the composition of the appointment committee (from the current three representatives to nine according to the new model, including the chair) while at the same time removing from the minister of justice the power to select the board's members.<sup>171</sup> According to the proposed model, one of the members would be a representative of the Irish Human Rights and Equality Commission,<sup>172</sup> whom the Commission would nominate, whereas the remaining nine members, including the chair, would be officially appointed by the minister with the approval of both houses of parliament by an ordinary majority and would in fact be selected by the Public Appointments Service — an independent administrative body responsible for hiring in the Irish public sector.<sup>173</sup> The decision on the recommendation would be made by a majority vote (and in the event of a tie, the chairperson would have the deciding vote),<sup>174</sup> and according to the new model, its members would endeavor to provide the minister with two to three candidate names for each vacancy (corresponding to the number and nature of vacancies).<sup>175</sup>

The bill was confirmed by a vote of the lower house, was deliberated before the senate's legislative committee, and is currently before the senate plenum for deliberation.<sup>176</sup> The bill has broad support, *inter alia*, because it aims to reduce the power held by jurists in the selection process (which leads, as the bill's supporters claim, to nepotism).<sup>177</sup>

167 Courts and Court Officers Act 1995 art. 13 (Ireland), as amended by Court of Appeal Act art. 12 (Ireland).

168 Courts and Court Officers Act 1995 art. 16(4) (Ireland).

169 Courts and Court Officers Act 1995 art. 16(6) (Ireland); see also Ireland's Responses to the Judicial Appointment Questionnaire, *supra* note 167, available at <https://tinyurl.com/yyxgb3q>; see also the Irish Supreme Court website at: <https://tinyurl.com/y3pwk59b>, as well as the Irish judicial advisory board website at [www.jaab.ie/en/JAAB/Pages/WP12000001](http://www.jaab.ie/en/JAAB/Pages/WP12000001). Finally, see the statement by the Irish minister of justice dated June 21, 2017, before the legislative plenum, regarding the appointment of a candidate for a position on the Court of Appeal (after the judicial advisory board did not succeed in recommending candidates for the position), available on the Irish Ministry of Justice website at [www.justice.ie/en/JELR/Pages/SP1700021](http://www.justice.ie/en/JELR/Pages/SP1700021).

170 Judicial Appointments Commission Bill 2017 art. 39 (Ireland), at <https://tinyurl.com/yyc68jmy>. We note that the current text is only a draft, as the bill is in the midst of the legislative process. For a previous version of the bill, including clear contradictions that were later corrected, see Fiach Kelly, *Confusion over Judicial Appointments Branded 'Farce'*, THE IRISH TIMES, May 24, 2018, <https://tinyurl.com/y6n9wah4>.

171 Judicial Appointments Commission Bill 2017 art. 10(1) (Ireland).

172 Judicial Appointments Commission Bill 2017 arts. 10(1)(g) and 12(9) (Ireland). The Irish Human Rights and Equality Commission is a statutory body that was first established in 2014 and serves as an independent nongovernmental body for the encouragement and advancement of human rights in the country.

173 Judicial Appointments Commission Bill 2017 arts. 12, 14 (Ireland).

174 Judicial Appointments Commission Bill 2017 art. 15(6) (Ireland).

175 Judicial Appointments Commission Bill 2017 arts. 40-42 (Ireland).

176 To follow the bill's progress, see updates on the Irish legislature's website at <https://tinyurl.com/y5uqtj6z>.

177 Pat Leahy, *Government Nominates Judges as Judiciary Bill Moves Slowly*, THE IRISH TIMES, July 10, 2018, <https://tinyurl.com/y3ghspjp>.



## The Netherlands

Type of Court	Supreme
Authority to Overturn Statutes	No
Judicial Declaration of a Constitution	No
Method of Selection	Minister of justice upon the recommendation of the legislative branch
Additional Details	Ceremonial appointment by the king
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	A nonbinding statutory recommendation

The Supreme Court of the Netherlands comprises the president of the Court, seven vice presidents, 24 justices, and four special justices, who serve until they reach the age of 70.<sup>178</sup> The Court is not empowered to engage in judicial review of legislation.<sup>179</sup> Every judge, who is ceremonially appointed by the sitting monarch, is in fact selected by the minister of justice from a short list of three names that is voted upon by the house of representatives (the lower house of the Dutch parliament) by an ordinary majority.<sup>180</sup> This list is formulated based on a broader list of six candidate names that the justices of the Supreme Court themselves submit to parliament after hearings have been held for the various candidates before a parliamentary committee of the house of representatives.<sup>181</sup> Every candidate must hold a degree in law.<sup>182</sup> To be clear, the parliament and minister of justice **are not obligated** by law to follow the Court's recommendations and may select any candidate according to their discretion. Up until now, new Supreme Court justices have in practice been selected following the recommendations of their sitting colleagues.<sup>183</sup> However, one may assume that the fact that the selection of the identity of justices is given, in the end, to the exclusive discretion of elected public officials will have already influenced the contents of the justices' recommendations.<sup>184</sup>

178 Elaine Mak, *Case Selection in the Supreme Court of the Netherlands — Inspired by Common Law Supreme Courts?*, 21(1) EURO. J. CURRENT L. ISSUES (2015), <http://webjcli.org/article/view/419/532>.

179 Gw. [CONSTITUTION] art. 120, at <https://tinyurl.com/y3onayok>.

180 Gw. [CONSTITUTION] art. 118; *Roel de Lange, Judicial Independence in the Netherlands*, JUDICIAL INDEPENDENCE IN TRANSITION 231, 270 (Anja Seibert-Fohr ed., 2012) [hereinafter *de Lange*].

181 *Id.* See also the response by the Netherlands Supreme Court to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/y2wa27mu>.

182 *Id.*

183 *Id.*; *de Lange*, *supra* note 181, at 270.

184 This is necessary because of the nature of the power balance between an entity that makes recommendations and an entity that has the right of veto. For an analysis of a similar situation through the lens of game theory (the process of appointing US Supreme Court justices, where the president of the US nominates the candidate but must receive the Senate's confirmation where the Senate holds veto power), see Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POLITICAL SCI. 231 (2007); Avinash K. Dixit & David McAdams, *Applying Game Theory to the Supreme Court Confirmation Fight*, HARV. BUSINESS REV., September 26, 2016, <https://hbr.org/2016/09/applying-game-theory-to-the-supreme-court-confirmation-fight>.



<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	The minister of justice based on a nonbinding committee recommendation
<b>Additional Details</b>	Ceremonial appointment by the queen
<b>Term</b>	Up until age 70
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	A nonbinding statutory recommendation

All of Denmark's courts have the power to engage in constitutional review of the validity of the parliament's laws, and the Supreme Court serves as the court of last resort on constitutional questions.<sup>185</sup> There are 17 justices and one president who sit on the Supreme Court. The other Supreme Court justices select their president from among themselves.<sup>186</sup> Candidates for the bench, who need not be sitting judges from the lower courts, must hold a graduate degree in law and pass a professional exam that includes the drafting of decisions in four different cases (at least one of which is in the area of civil law).<sup>187</sup>

Pursuant to the law, the minister of justice selects the justices based on the **nonbinding** recommendation of a commission whose members she appoints.<sup>188</sup> Up until now, the minister of justice has always accepted the professional commission's recommendations,<sup>189</sup> but one may assume that the commission's awareness — that the minister is the one to ultimately select the justices, at his or

185 The last decision in which unconstitutional legislation was overturned was issued in 1999 in the *Matter of Tvind*; see UfR 1999.841 H.

186 CONSTITUTION OF DENMARK art. 59, at <https://tinyurl.com/y2rkqz93>; Administration of Justice Act art. 2 (Denmark), available (in Danish) at <https://danskelove.dk/retsplejeloven>. For more details, see the Supreme Court of Denmark's website, available (in Danish) at [www.hoejesteret.dk/om/Personale/Pages/default.aspx](http://www.hoejesteret.dk/om/Personale/Pages/default.aspx).

187 See also the response by the Supreme Court of Denmark to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/yy86dvjr> [hereinafter Denmark's Response to the Judicial Appointment Questionnaire]; Administration of Justice Act of 1916 art. 42 (Denmark).

188 Administration of Justice Act of 1916 art. 43A (Denmark); see also Denmark's Response to the Judicial Appointment Questionnaire, *supra* note 188, available at: <https://tinyurl.com/yy86dvjr>.

189 See the description on the website of the Denmark Court Administration website at <https://tinyurl.com/yxtc8olb>.

her own sole discretion — shapes the commission's recommendations.<sup>190</sup> The appointment itself is made ceremoniously by the country's queen.<sup>191</sup> The appointed justice's term ends when he or she reaches the age of 70.<sup>192</sup>

The advisory committee consists of six members: a Supreme Court justice, a judge of the High Court, a judge of the District Court, an attorney, and two public representatives (who are not members of parliament) — all of whom are, as aforesaid, appointed by the minister of justice for a one-time four-year term, based on the recommendations of various entities.<sup>193</sup>

190 This is necessary because of the nature of the power balance between an entity that makes recommendations and an entity that has the right of veto. For an analysis of a similar situation through the lens of game theory, see Keith Krehbiel, *supra* note 185; Dixit & McAdams, *supra* note 185.

191 See the description on the website of the Denmark Court Administration website at <https://tinyurl.com/yxtc8olb>.

192 Administration of Justice Act of 1916 art. 1A(2) (Denmark).

193 Administration of Justice Act of 1916 art. 43B (Denmark) The country's courts and bar association recommend the jurist members of the committee, whereas regarding the committee members who are public representatives, the minister of justice receives the recommendations for them from the local governing authority and the Dansk Folkeoplysnings Samråd — the umbrella volunteer organization of organizations and associations engaged in informal education throughout the country.



## Sweden

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The executive branch based on a nonbinding committee recommendation
Additional Details	—
Term	Up until age 69
Elected Public Officials Decide	Yes
Involvement by Jurists	A nonbinding statutory recommendation

The Swedish legal system includes two high courts of equal stature that comprise 16 judges each: the Supreme Court (which engages in civil and criminal law) and the Supreme Administrative Court.<sup>194</sup> Both courts, like the rest of the country's courts, have the power to review the constitutional validity of parliamentary statutes.<sup>195</sup> In the past, the courts' judges were appointed solely by the government through a nontransparent process without the involvement of any outside entities,<sup>196</sup> and they were only required to hold a graduate degree in law and meet the qualification requirements defined by law.<sup>197</sup> However, in 2011, a new law took effect pursuant to which although the power to select who fills such judicial vacancies was retained by the government, it must now first obtain a **nonbinding** recommendation from an advisory board composed of nine members (who serve for four years) that reviews candidate applications. The committee includes two members of parliament as well as seven judges and attorneys appointed by the government.<sup>198</sup> An appointed justice's term ends when he or she reaches the age of 69.<sup>199</sup>

194 Regeringsformen ([RF] [Constitution] 11:1 0). This basic law is one of the four basic laws that jointly comprise the Swedish Constitution, at <https://tinyurl.com/y3sfgawy>. We note that while the Supreme Court must have 16 justices, the Supreme Administrative Court must have at least 14 members (see, respectively, Rättegångsbalken [RB] (Code of Judicial Procedure) 3:4, at <https://tinyurl.com/y5mqymvw>, and Act on the General Administrative Courts art. 3 (Sweden), available (in Swedish) at <http://tinyurl.com/v67pasb>). The list of current sitting judges may be viewed on the courts' websites, available (in Swedish) at <https://tinyurl.com/r8xdfnx>; <https://tinyurl.com/v6gmdjb>.

195 Regeringsformen ([RF] [Constitution] 11:14).

196 Regeringsformen ([RF] [Constitution] 11:6. For a survey of the subject, see Elise Krumholz, NOMINATING THE JUSTICES OF THE SUPREME COURT: A COMPARATIVE STUDY OF THE UNITED STATES AND SWEDEN 17-22 (2014) at <https://tinyurl.com/yf4ofrv> [hereinafter Krumholz].

197 Rättegångsbalken [RB] (Code of Judicial Procedure) 4:1. See also the response by the Supreme Court of Sweden to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/y5ebrsf>.

198 *Id.*; Appointing Permanent Judges Act arts. 4, 11 (Sweden), available (in Swedish) at <https://tinyurl.com/ywv7pkl>.

199 Regeringsformen ([RF] [Constitution] 7:2; Employment Protection Act art. 32A (Sweden), available (in Swedish) at <https://tinyurl.com/ymxloz2rd>; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, THE COMPOSITION OF CONSTITUTIONAL COURTS, *supra* note 104.



## Norway

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The executive branch based on the nonbinding recommendations of a committee and the chief justice of the Supreme Court
Additional Details	Ceremonial appointment by the king
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	A statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials

The Supreme Court of Norway is authorized to engage in constitutional judicial review of parliamentary legislation.<sup>200</sup> The Court comprises 19 justices and the chief justice, all of whom must be at least 30 years of age and hold a degree in law. Since 2002, the process of selecting judges in the country has included a professional commission that recommends to the government three candidates for each judicial vacancy.<sup>201</sup> The commission, the identity of whose members is determined by the government, includes, primarily, professional legal personnel (three judges, an attorney, and a public sector jurist) as well as two public representatives with no legal background.<sup>202</sup> We emphasize that its recommendations **do not bind** the government, which is entitled to select a person not included therein. However, in such case, it must provide the candidate's name to the commission for its review in order that the commission be able to give its (nonbinding) recommendation regarding the candidate.<sup>203</sup> In addition to the commission's recommendation, the law requires that the chief justice of the Supreme Court must also give his or her opinion on the appointment.<sup>204</sup> Although the chief justice's opinion is nonbinding, in practice, since the start of

200 Anine Kierulf, *Norway: Human Rights and Judicial Review Constitutionalized*, INT'L. CONST. L. BLOG (June 5, 2015), <https://tinyurl.com/ysx5rb8d>. For more on the subject, see ANINE KIERULF, JUDICIAL REVIEW IN NORWAY: A BICENTENNIAL DEBATE (2018).

201 Courts of Justice Act art. 55B (Norway). The change in the appointment process was based on the recommendations of a special committee that dealt with the procedures of the country's courts. See Section 7.5.4 of the committee's recommendations in its submitted report, available (in Norwegian) at <https://tinyurl.com/y266xwsv>.

202 Courts of Justice Act art. 55A (Norway). See also the response by the Supreme Court of Norway to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/yyajmymu>.

203 Courts of Justice Act art. 55C (Norway).

204 Courts of Justice Act art. 55B (Norway).

this arrangement, the candidate recommended by the chief justice has always been appointed.<sup>205</sup> The appointed justice's term ends when he or she reaches the age of 70.<sup>206</sup>

As opposed to the process of appointing the justices of the Supreme Court, the chief justice is appointed without the commission's involvement.<sup>207</sup> Since the inception of the advisory commission's activities concerning Supreme Court justices, only one chief justice has been appointed to the Supreme Court. Pursuant to law, the advisory commission was not involved in the appointment process, and the appointment was made secretly and not transparently, resulting in much public criticism.<sup>208</sup>

205 Courts of Justice Act art. 55 (Norway); see also Anine Kierulf, *Norway: New Chief Justice Appointed to the Supreme Court*, Int'l J. CONST. L. BLOG (March 1, 2016), <https://tinyurl.com/y46x8m7m>.

206 European Commission for Democracy Through Law (Venice Commission), *supra* note 104.

207 Courts of Justice Act art. 55B (Norway).

208 See, e.g., NTB, *Norge får snart en ny høyesterettsjustitiarius, men Justisdepartementet nekter å utlevere rapporten om de seks søkerne til sjefsjobben, skriver VG*, NETTAVISJON (January 12, 2016), available (in Norwegian) at: <https://tinyurl.com/y3chml2o>.

<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	It is not possible to overturn a law, but it is possible to ignore a law that is unconstitutional in the framework of a specific case.
<b>Judicial Declaration of a Constitution</b>	No; there is an override clause
<b>Method of Selection</b>	The country's president (a member of the executive branch) based on a nonbinding recommendation by the Court
<b>Additional Details</b>	—
<b>Term</b>	Up until age 68
<b>Elected Public Officials Decide</b>	Yes
<b>Involvement by Jurists</b>	A nonbinding statutory recommendation

The Finnish legal system includes two high courts of equal stature: The Supreme Court (which engages in civil and criminal law) and the Supreme Administrative Court. As with the country's other courts, both of these courts are empowered to engage in constitutional review of legislation, but they can only ignore a law that runs afoul of the Constitution in the specific case before them and do not have the power to declare it void.<sup>209</sup> Additionally and despite the fact that the courts do not have the power to overturn legislation, the country's Constitution also has a sort of "override clause" that permits the enactment of ordinary legislation that runs afoul of the Constitution through a special process. The process required to enact a statute that is exempt from the provisions of the Constitution is identical to the process required for amending the Constitution and requires a special and absolute majority of the members of the legislature.<sup>210</sup>

209 CONSTITUTION OF FINLAND, arts. 3, 106, at <https://tinyurl.com/z9b8c4v>. See also Seppo Tiitinen, *Constitutional Reform in Finland*, CONSTITUTIONAL AND PARLIAMENTARY INFORMATION 104, 111 (1999), <https://tinyurl.com/y53lllke>; Toumas Ojanen, *Constitutional Amendment in Finland*, in ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 93, 106-109 (Xenophon Contidas ed., 2013).

210 *Id.* at 104-106. See also Hillel Sommer, *Wonder Drug or Poison Pill? A Reexamination of the Override Mechanism*, 12 HUKIM 55, 77-79 (2018), <https://tinyurl.com/y68lstfu>; Dag Anckar, *Evading Constitutional Inertia: Exception Laws in Finland*, 11 SCANDINAVIAN POLITICAL STU. 195 (1988). We note that the provisions of the Finnish Constitution that are customarily construed as establishing an override mechanism are completely different than the override clauses that are in use in countries such as Canada or Israel. In Finland, even when, in the rare event, the legislature adopts ordinary legislation in a process that is identical to the process of amending the Constitution (which requires a special and absolute majority of parliament) in order to effect a statute that runs afoul of it, such legislation does not rise to the level of overriding the Constitution but rather "merely" amends it de facto. Nevertheless, that understanding is, to a large extent, a question of interpretation. After all, even "overriding"-type legislation in Finland has elements that are not compatible with constitutional language. However, one way or the other, one must remember that the country's courts do not have the power to overturn statutes. Thus, it is possible that it would be more correct to characterize said mechanism as merely a means available to the legislative branch to override the constituent branch only, without intervention by the judicial branch. In that way, the Finnish mechanism is materially different from the override mechanisms common in Israel and Canada.

The judges of the two high courts (at least 16 members in each court) must hold a graduate degree in law.<sup>211</sup> The ordinary judges in each court are appointed by the country's president (one of the heads of the executive branch) upon the recommendation of the relevant court itself.<sup>212</sup> The minister of justice provides the recommendation to the country's president.<sup>213</sup> Although the president may deviate from the high courts' recommendations, in practice, the appointment always follows them.<sup>214</sup> However, one may assume that the justices' awareness — that the president is the one to ultimately select the justices, at his or her sole discretion — shapes the justices' recommendations.<sup>215</sup> Similarly, in the framework of said appointment, the law allows the high courts to request the opinion of the judicial advisory committee — a statutory body comprising primarily sitting judges,<sup>216</sup> which is bound by law to provide its opinion regarding candidates for judicial vacancies in the lower courts.<sup>217</sup> Conversely, the country's president appoints the presidents of the Supreme Court and the Supreme Administrative Court without the recommendation of any of the courts.<sup>218</sup> The appointed justice's term ends when he or she reaches the age of 68.

211 Supreme Court Act (665/2005) art. 10 (Finland), at <https://tinyurl.com/wp77z18>; Supreme Administrative Court Act (1265/2006) art. 10 (Finland), at <https://tinyurl.com/qvzdqco>; Courts Act (673/2016) 10:1 (Finland), at <https://tinyurl.com/y5s9b826>. The Supreme Court of Finland currently has 19 sitting justices; see the Court's website at <https://tinyurl.com/wdnpzqd>. In contrast, the Supreme Administrative Court of Finland currently has 21 sitting justices as well as a number of additional justices who are appointed temporarily; see the Court's website at <https://tinyurl.com/r8zvs7>.

212 Courts Act 11:7 (Finland).

213 Response by Prof. Toumas Ojanen of the University of Helsinki, expert in constitutional law, to the Kohelet Forum's questions dated November 22, 2018.

214 *Id.*; Supreme Court of Finland's spokesperson's response to the Kohelet Forum's questions dated November 27, 2018.

215 This is necessary because of the nature of the power balance between an entity that makes recommendations and an entity that has the right of veto. For an analysis of a similar situation through the lens of game theory, see Krehbiel, *supra* note 185; Dixit & McAdams, *supra* note 185..

216 Courts Act 20:1-2 (Finland). Although the government officially appoints the committee members, the country's various courts nominate most of them. The law requires that an alternate name must be attached to the name of every proposed candidate, and therefore, it seems that the government has no real influence on the identity of the committee members other than one individual representative whose name is proposed by the Ministry of Justice.

217 Courts Act 11:8 (Finland).

218 Courts Act 11:7(1) (Finland).



## Iceland

Type of Court	Supreme
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The minister of justice, upon the recommendation of a committee (with a certain ability to deviate)
Additional Details	Ceremonial appointment by the president of the country (who is not the head of the executive branch)
Term	Up until age 70
Elected Public Officials Decide	Yes
Involvement by Jurists	A binding statutory recommendation with a political override mechanism

The Supreme Court of Iceland is empowered to engage in constitutional review of legislation.<sup>219</sup> The Court's nine justices must be citizens who are at least 35 years old who have served at least three years in one of the following positions: judge; attorney authorized to appear before the Supreme Court; professor of law; member of the criminal justice system (in one of the positions denominated in the law); **permanent secretary or general director of a government ministry**; or member of the legislature. Additionally, every justice must hold a degree in law.<sup>220</sup>

The judges are selected by the minister of justice who, as of 2010, is required — as a rule — to select a candidate from a list put together by an evaluation committee. The committee is composed of two representatives of the Supreme Court (the chair and an additional representative — at least one of whom is not a sitting judge), a representative of the District Courts Administration, a representative of the Icelandic Bar Association, and a representative of the Althingi (the Icelandic legislature). Even though as a rule, the minister must nominate a candidate from the committee's candidate list, he or she is also permitted to submit a request to the legislature to deviate from this procedure. However, even where the legislature grants its approval, the evaluation committee must still confirm that the candidate whom the minister proposes meets the threshold conditions for the position that are set forth in the law. Similarly, the legislature must approve the minister's request within one month of its submission. Otherwise, the minister will be bound by the committee's original recommendation.<sup>221</sup> The above exception was applied even

219 Iceland's Constitution does not expressly grant a power of constitutional review. It is a result of caselaw and therefore, officially, all of the country's courts have the power to engage in a constitutional review of legislation. For a survey of the subject, see Ragnhildur Helgadóttir, *Nonproblematic Judicial Review: A Case Study*, 9 INT'L. CONST. L. 532 (2011), <https://academic.oup.com/icon/article/9/2/532/649665>.

220 Act on the Judiciary art. 4 (Iceland), available at: <https://tinyurl.com/yyrxnos2>.

221 Act on the Judiciary art. 4A (Iceland).



recently, albeit in relation to the appointment of judges to a new intermediate court that sits between the District Courts and the Supreme Court.<sup>222</sup> Once a candidate has been selected, a ceremonial appointment is made by the country's president (who is not the head of the executive branch), and the justice serves until reaching the age of 70.<sup>223</sup>

222 See the survey, available at: <https://tinyurl.com/y27yl3z>. In that case, the people of Iceland sought to staff the newly-established intermediate court. The evaluation committee provided the minister with a list of 15 candidates. The minister replaced four of them with her own candidates and submitted the amended list for the legislature's approval. The Supreme Court ratified the minister's authority to deviate from the committee's recommendations but held that she did not prove that she had performed a sufficient evaluation of the outside candidates' qualifications in comparison to the qualifications of the four candidates who had been disqualified and therefore, she did not meet the procedural requirements for obtaining legislative approval for deviation from the committee's recommendation (meaning, the approval was granted, but according to the Supreme Court, unlawfully). The decision is available on the Supreme Court of Iceland's website, available (in Icelandic) at: <https://tinyurl.com/y3okzez8>.

223 European Commission for Democracy Through Law (Venice Commission), *supra* note 104



## Latvia

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	Three by the legislative branch, two by the executive branch, and two by the Supreme Court; all with the approval of the legislative branch
Additional Details	—
Term	Ten years (nonrenewable) or until the age of 70
Elected Public Officials Decide	Five judges — yes; two judges — no
Involvement by Jurists	Five judges — a nonbinding statutory recommendation; two judges — binding involvement

The Constitutional Court of Latvia, which is empowered to overturn unconstitutional legislation,<sup>224</sup> consists of seven judges who are appointed for one-time terms of 10 years<sup>225</sup> and serve until they reach the age of 70. Three of the justices are selected by the parliament by an ordinary majority (at least 10 members of parliament must sign the candidate's recommendation), two are selected by the cabinet, and two others are selected by a special meeting of all of the justices of the Supreme Court (as distinguished from the Constitutional Court). Contrary to the parliament and the government, the justices of the Supreme Court are obligated to select a candidate solely from among the country's sitting judges.<sup>226</sup> Finally, all of the candidates must receive parliamentary approval by an absolute majority of the Saeima (parliament).<sup>227</sup> Candidates for vacancies on the Constitutional Court must be at least 40 years of age, hold a graduate degree in law, and have at least 10 years' of legal experience.<sup>228</sup> The law imposes a statutory requirement on parliament to seek the opinion of a body called the "Board of Justice,"<sup>229</sup> which primarily comprises judges and professionals from all of the fields of law practiced in the country. However, its opinion is **nonbinding**.<sup>230</sup>

224 Constitutional Court Law §16 (Latvia), at <https://tinyurl.com/y2u4zv8s>.

225 Constitutional Court Law §§7-8 (Latvia).

226 Constitutional Court Law §4 (Latvia).

227 Constitution of Latvia art. 85, at <https://tinyurl.com/y5cchmpo>.

228 Constitutional Court Law §4(2) (Latvia).

229 Constitutional Court Law §4(5) (Latvia).

230 Law on the Judiciary §8911(3) (Latvia), available (in Latvian) at <https://likumi.lv/doc.php?id=62847>.



## Lithuania

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Three by the chair of the Seimas (parliament), three by the country's president (who is not the head of the executive branch but is elected in a general election), and three by the president of the Supreme Court; all with the approval of the legislative branch
<b>Additional Details</b>	—
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Six justices — yes; three justices — no
<b>Involvement by Jurists</b>	Six justices — no; three justices — with binding involvement by jurists who were themselves appointed by elected public officials

The Constitutional Court of Lithuania, which is empowered to overturn unconstitutional legislation,<sup>231</sup> comprises nine justices who are appointed by the Seimas (parliament) by an ordinary majority for a one-time term of nine years as follows: one-third upon the recommendation of the country's president (who is not the head of the executive branch but possesses certain executive powers including the actual power to select judges for the Constitutional Court);<sup>232</sup> one-third upon the recommendation of the chair of the Seimas; and one-third upon the recommendation of the president of the Supreme Court (who is himself/herself appointed by the Seimas, by an ordinary majority, upon the recommendation of the country's president).<sup>233</sup> The Seimas appoints the president of the Constitutional Court by an ordinary majority from among the Constitutional

231 Lithuanian Constitution arts. 105, 107, at <https://tinyurl.com/y4jukpw7>; Law on the Constitutional Court art. 1 (Lithuania), at <https://tinyurl.com/ybwsyant>.

232 According to the response by the Constitutional Court of Lithuania to the Kohelet Forum's questions dated November 12, 2018. We must note that the structure of the Lithuanian government is semi-presidential (meaning, governmental powers are distributed between the president and the prime minister). Thus, although the president (who is elected directly) is the one who appoints the prime minister, only the Seimas may remove the prime minister from power. With that, although the prime minister is the one who in fact manages the executive branch, the president still has real and significant powers, including the power to select three of the judges of the Constitutional Court. For an interesting breakdown of the distribution of powers between the country's officials, see Tapio Raunio & Thomas Sedelius, *Shifting Power-Centers of Semi-Presidentialism: Exploring Executive Coordination in Lithuania*, GOVERNMENT & OPPOSITION, Dec. 4, 2017, <https://tinyurl.com/y2z3a8xx>.

233 LITHUANIAN CONSTITUTION arts. 84(11), 112. Regarding the appointment of the president of the Supreme Court, see also the response by the Lithuanian Supreme Court to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualifications) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/yjyobys8n>.

Court's judges upon the recommendation of the country's president.<sup>234</sup> Every three years, three judges are replaced, one of each appointment type.<sup>235</sup> Candidates must hold an academic degree in law and have at least 10 years' experience in one field of law.<sup>236</sup>

234 LITHUANIAN CONSTITUTION arts. 84, 103; Law on the Constitutional Court §4 (Lithuania).

235 *Id.*; LITHUANIAN CONSTITUTION art. 103. For an additional description, see the Lithuanian Constitutional Court's website at <https://tinyurl.com/yzk5cvob>.

236 LITHUANIAN CONSTITUTION art. 103.



<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Five by the country's president (who is not the head of the executive branch and is elected by parliament), five by the legislative branch, and five by the judicial branch
<b>Additional Details</b>	—
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Ten judges — yes; five judges — no
<b>Involvement by Jurists</b>	Ten judges — none; five judges — binding involvement

The Constitutional Court of Italy is empowered to void laws that are unconstitutional.<sup>237</sup> The Court comprises 15 judges: Five are selected by the president (who is not the head of the executive branch and is elected by parliament); five are selected by the houses of parliament in a joint session by a special majority of at least two-thirds of those voting on the first three attempts and three-fifths of those voting in the event that the previous attempts did not succeed; and five are selected by the country's supreme courts. Judges serve in their positions for one-time nine-year terms and are selected from among the country's high courts, law professors, and attorneys with at least 20 years' experience.<sup>238</sup> The members of the Supreme Court select court's president from among their members.<sup>239</sup>

Although they are completely independent from the moment that they are sworn in, the five candidates who are appointed by parliament (who for the most part are not sitting judges but rather attorneys or legal university professors) generally reflect the political power distribution in the country. At times, even former members of parliament are appointed. Therefore, the appointment process includes a special majority requirement in order to balance the inherent advantage that the coalition holds in selecting candidates.<sup>240</sup> Furthermore, it is common that when selecting those candidates who are within his or her purview, the country's president seeks to counter-balance the parliament's selection and ensure that the composition of the Constitutional Court indeed properly reflects the country's political, cultural, and ideological spectrum.<sup>241</sup>

237 Art. 134 COSTITUZIONE [COST.], at <https://tinyurl.com/y8lkmyfg>.

238 Art. 135 COSTITUZIONE [COST.].

239 *Id.*

240 *Id.*; For additional details, see the Overview of the Italian Supreme Court, *supra* note 240, at 21.

241 *Id.* at 22.



## Spain

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	Eight by the legislative branch, two by the executive branch, and two by the judicial branch
Additional Details	Ceremonial appointment by the king
Term	Nine years (renewable, after a cooling period)
Elected Public Officials Decide	Ten magistrates (justices) — yes; five magistrates — no
Involvement by Jurists	Ten magistrates — none; two magistrates — with binding involvement by jurists who were themselves appointed by elected public officials

On the Constitutional Court, which is empowered to overturn primary legislation,<sup>242</sup> there are 12 magistrates (justices), who are appointed to serve for nine years (Every three years, four magistrates are replaced.).<sup>243</sup> A threshold condition for the position is at least 15 years' experience in one of the following professions: judge, prosecutor, jurist, public official, or lawyer.<sup>244</sup> In contrast to the judges on the country's ordinary courts, there is no prohibition against a magistrate of the Constitutional Court belonging to a political party, but he or she may not serve in a political position during his or her judicial tenure.<sup>245</sup>

Four of the magistrates on the Constitutional Court are selected by the Congress of Deputies by an absolute and special majority of 60% of the members of that chamber. Four additional magistrates on the Constitutional Court are selected by the senate by an absolute and special majority of 60% of the senate. Finally, two of the magistrates are selected by the government, and two are selected by the General Council of the Judiciary.<sup>246</sup> In the legislature's selection of magistrates, it is common practice to select judges according to the relative representation of each party in the legislature.<sup>247</sup> The magistrates are ceremonially appointed by the king of Spain.

242 CONSTITUCIÓN ESPAÑOLA [C.E.] arts. 161-163 at <https://tinyurl.com/3knbq8r>.

243 C.E. art. 159(3); Constitutional Court Law art. 16 (Spain), available (in Spanish) at <https://tinyurl.com/yxct7dxc>. The language of that section that prohibits a second **consecutive** term for a magistrate of the Constitutional Court if his or her first term has exceeded three years suggests that it is possible to reappoint a magistrate for additional terms after a "cooling-off period." See also the description on the Spanish Constitutional Court website at <https://tinyurl.com/y6myaef5>.

244 C.E. art. 159(2).

245 See Enrique Guillen Lopez, *Judicial Review in Spain: The Constitutional Court*, 41 *LOY. L. A. L. REV.* 529, 534 (2008).

246 C.E. art. 159(1).

247 Lopez, *supra* note 248, at 536.

The General Counsel of the Judiciary is composed of the chief justice of the Supreme Court (a separate court from the Constitutional Court), eight attorneys or jurists — half of them selected by the Congress of Deputies and half of them by the Senate — and 12 judges — half selected by the Congress of Deputies and half by the senate (in each case, the selection requires an absolute and special majority of 60% of the members of the chamber).<sup>248</sup> The president of the Constitutional Court has a particularly important role in constitutional cases, as he or she has a decisive vote in the event of a split between those in favor of overturning the law and those opposed.<sup>249</sup> The president is elected by a vote by the members of the Constitutional Court themselves.<sup>250</sup>

248 C.E. art. 122(3); Law on the Judiciary art. 567 (Spain), at <https://tinyurl.com/yyhzu9fv>.

249 Lopez, *supra* note 248, at 532.

250 C.E. art. 160.



## Portugal

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Ten by the legislative branch and three by the members of the Constitutional Court themselves
<b>Additional Details</b>	—
<b>Term</b>	Nine years (nonrenewable)
<b>Elected Public Officials Decide</b>	Ten justices — yes; five justices — no
<b>Involvement by Jurists</b>	Ten justices — none; three justices — with binding involvement by jurists who were themselves appointed by elected public officials

On the Constitutional Court of Portugal, which is empowered to overturn unconstitutional legislation,<sup>251</sup> there are 13 justices appointed for one-time nine-year terms. Of those, ten are directly selected by the Assembly of the Republic by a special majority of two-thirds of those present for the vote who also constitute an absolute majority of the members of the Assembly.<sup>252</sup> These justices, in turn, select the three remaining justices. Finally, the 13 justices all select one justice from among themselves to serve as president of the Constitutional Court.<sup>253</sup> Of these 13 justices, six must be selected from among the judiciary. The remainder may also be attorneys or jurists.<sup>254</sup>

251 CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] arts. 277-283, at <https://tinyurl.com/y2veyr6o>.

252 C.R.P., art. 163(H).

253 C.R.P. art. 222.

254 *Id.* See also the description on the Portuguese Constitutional Court website at <https://tinyurl.com/y3dce82l>.





## South Korea

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Three by the country's president (the head of the executive branch), three by the legislative branch, and three by the chief justice of the Supreme Court (who is himself or herself selected by elected public officials)
<b>Additional Details</b>	—
<b>Term</b>	Six years (renewable), until retirement age (65 for a justice on the Constitutional Court, 70 for the chief justice of the Constitutional Court)
<b>Elected Public Officials Decide</b>	Six justices — yes; three justices — no
<b>Involvement by Jurists</b>	Six justices — no; three justices — with involvement by jurists who were themselves appointed by elected public officials

The nine justices on the Constitutional Court of South Korea, which is empowered to overturn unconstitutional legislation,<sup>255</sup> are appointed for terms of six years that can be renewed (as long as the justice has not reached retirement age).<sup>256</sup> Appointments are made as follows: Three justices are selected by the country's president alone (where the president is the head of the executive branch and has actual power to make such selections); three are appointed by the country's president pursuant to the selection by the chief justice of the Supreme Court (who is himself or herself selected by the country's president with the consent of the National Assembly);<sup>257</sup> and three are appointed by the country's president pursuant to the selection made by the National Assembly by an ordinary majority.<sup>258</sup> The chief justice of the Constitutional Court is selected by the country's president, with the approval of the National Assembly, from among the Court's sitting justices.<sup>259</sup> Candidates for vacancies on the Constitutional Court must be 40 years of age or older and possess at least 15 years' experience in one of the following roles: judge, prosecutor, lawyer, or member of a law faculty.<sup>260</sup> All candidates must undergo a hearing before the National Assembly.<sup>261</sup>

255 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111(1), at <https://tinyurl.com/y43z8cxs>.

256 The retirement age for a line justice of the Constitutional Court is 65, whereas the retirement age for the chief justice of the Constitutional Court is 70. For a description, see the South Korean Constitutional Court's website at <https://tinyurl.com/yxmtm09v>.

257 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 104(1).

258 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111. See also the description on the South Korean Constitutional Court website at <https://tinyurl.com/yxmtm09v>.

259 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111(4).

260 Constitutional Court Act art. 5(1) (Republic of Korea), at <https://tinyurl.com/yxs2m2se>.

261 Constitutional Court Act art. 6(2) (Republic of Korea).



## Chile

<b>Type of Court</b>	Constitution
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	No
<b>Method of Selection</b>	Three by the country's president (head of the executive branch), three by the Supreme Court, and four by the two legislative houses
<b>Additional Details</b>	—
<b>Term</b>	Nine years (nonrenewable), only until age 75
<b>Elected Public Officials Decide</b>	Seven ministers (judges) — yes; three ministers — no
<b>Involvement by Jurists</b>	Seven ministers — none; three ministers — binding involvement

In the Constitutional Court of Chile, which is empowered to overturn unconstitutional statutes,<sup>262</sup> there are 10 ministers (judges), who are each appointed for a one-time term of nine years. Three of these ministers are selected by the country's president (head of the executive branch who has actual judicial selection power), three ministers are selected by the Supreme Court, two ministers are selected by the senate by an absolute and special majority of two-thirds of the members of the senate, and finally, two ministers are selected by the Chamber of Deputies by an absolute and special majority of two-thirds of the members of the chamber and confirmed by the senate by the same majority.<sup>263</sup> Candidates must hold a degree in law for at least 15 years.<sup>264</sup>

262 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 93 at <https://tinyurl.com/y33cescy>.

263 Additionally, the minister's term ends upon his or her reaching the age of 75; see C.P., art. 92.

264 *Id.*



## United Kingdom

Type of Court	Supreme
Authority to Overturn Statutes	No
Judicial Declaration of a Constitution	No
Method of Selection	A professional commission in collaboration with the secretary of state for justice who has the right to refuse and has limited influence
Additional Details	Ceremonial appointment by the queen
Term	Up until age 75
Elected Public Officials Decide	No
Involvement by Jurists	Binding involvement

In 2005, the British judicial system was comprehensively reformed, as a result of which, the current Supreme Court was established in 2009. The Supreme Court comprises 12 justices and replaced the House of Lords, which, up until that time, had been the highest court in the land.<sup>265</sup> The Supreme Court **does not** have the power to overturn parliamentary legislation;<sup>266</sup> it only has the power to declare a law to be incompatible with the British Human Rights Act — a declaration that leaves the decision whether to amend the statute to parliament. Each candidate for the Supreme Court must meet one of the following criteria: service as a judge on a high court for at least two years; practice as an active attorney for at least 15 years; or conformance with the conditions for qualification for appointment as a judge in one of the lower courts for at least 15 years.<sup>267</sup>

In the framework of the above reform, the judicial appointment process, which in the past had been the exclusive purview of the secretary of state for justice (lord chancellor), was also changed.<sup>268</sup> Currently, when a seat is vacated on the Supreme Court, a national judicial appointments commission is convened, which today comprises five members (the minimum number of members by law):<sup>269</sup> The president of the Supreme Court (and in his or her absence, the vice president of the Supreme Court) who is also the chair of the commission; another senior judge who is not on the Supreme Court and who is selected by the president of the Supreme Court (or in his or her absence, by the vice president of the Supreme Court and, in his or her absence, the oldest of the Supreme Court judges);<sup>270</sup> as well as one representative of each of the judicial appointment commissions of England and Wales, Northern Ireland, and Scotland. Appointment commission representatives are selected by the commissions themselves, and at least two of them must not have any legal background.<sup>271</sup> We note that when both the president as well as the vice president of the Court are unable to serve on the national commission (for example, when it convenes to appoint a new vice

265 Constitutional Reform Act 2005 art. 23(2) (UK), <https://tinyurl.com/y6bngkfe>.

266 For more on the subject, see Ariel Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model*, 17 Am. U. Int'l L. Rev. 683 (2002).

267 Constitutional Reform Act 2005 art. 25 (UK).

268 See §120 of the report by the UK Parliament's Select Committee on Constitutional Affairs at <https://tinyurl.com/yyyejjsn>.

269 Constitutional Reform Act 2005 arts. 26-27 (UK).

270 Supreme Court (Judicial Appointments) Regulations 2013 amend. 7 (UK), at <https://tinyurl.com/y3c8b48r>; Constitutional Reform Act 2005 art. 60 (UK).

271 Supreme Court (Judicial Appointments) Regulations 2013 amend. 5 (UK).

president of the Supreme Court and the seat of the president of the Supreme Court is vacant), the oldest of the Supreme Court judges serves in their place.<sup>272</sup> When the judicial selection commission convenes to select a president of the Supreme Court, the sitting president may not participate in its deliberations<sup>273</sup>, and therefore, the vice president serves in his or her place (and in the vice president's absence, the oldest of the Supreme Court judges serves in their place). In addition, in that event, it is in fact one of the representatives with no legal background who serves as chair.<sup>274</sup>

The commission must consult with various entities prior to formulating its recommendations, including the judges of the Supreme Court who are not members of the commission, the presidents of the various courts of the country (other than those who are candidates for appointment who are under consideration while the commission convenes), the Judicial Appointment Commission of Northern Ireland, as well as the secretary of state for justice (lord chancellor) and the prime ministers of Scotland and Wales.<sup>275</sup> The secretary of state for justice (lord chancellor) may give the commission written guidelines as to the considerations that its members must take into account when seeking to formulate its recommendation, and these require the approval of both houses of parliament. The content of these guidelines is limited by law to professional considerations. The commission has a statutory obligation to take the lord chancellor's guidelines into account but is not obligated to select a candidate in conformance therewith.<sup>276</sup>

After it is formulated, the commission provides its recommendation to the secretary of state for justice (lord chancellor), who has extremely limited discretion in this process.<sup>277</sup> The commission selects one candidate<sup>278</sup> and provides his or her name to the lower chancellor in a detailed report that also addresses those entities with whom the commission consulted as well as their opinions. Upon receipt of the report, the secretary of state for justice (lord chancellor) must consult with those same entities independently.<sup>279</sup> At that point, he or she has limited veto power regarding the appointment; after receiving the report, the lord chancellor can choose between two courses of action:<sup>280</sup>

272 Supreme Court (Judicial Appointments) Regulations 2013 amend. 11 (U.K).

273 Constitutional Reform Act 2005 art. 27(1C) (UK).

274 Supreme Court (Judicial Appointments) Regulations 2013 amend. 8 (UK).

275 Supreme Court (Judicial Appointments) Regulations 2013 amend 18 (UK); Constitutional Reform Act 2005 art. 60 (UK).

276 Constitutional Reform Act 2005 arts. 27(9), 27(B) (UK).

277 Article 27A(1)(C) of the Constitutional Reform Act 2005 (UK) expressly stipulates that the regulations regarding the Supreme Court judicial appointment process (whose provisions appeared, up until 2013, in the Act itself) shall include an instruction that at a certain stage, the lord chancellor will be bound by the commission's decision. See also the response by the UK Supreme Court to the questionnaire on the "Assessment and Promotion of Judges for Access to the Supreme Court and the Manner of the Appointment (Assessment and Qualification) of Judges to the European Court of Justice and the European Court of Human Rights" in preparation for the convening of the Fifth Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, which took place in Paris on October 25, 2012, available at <https://tinyurl.com/yspbtmjg>.

278 Constitutional Reform Act 2005 art. 27(10) (UK).

279 Supreme Court (Judicial Appointments) Regulations 2013 amend. 19(5) (UK).

280 Supreme Court (Judicial Appointments) Regulations 2013 amend 20 (UK).

1. The lord chancellor has the authority to reject the first candidate that the commission submits. In such case, the commission must provide the lord chancellor with the name of another candidate (following the process described above), and if the lord chancellor does not want that candidate either, he or she may request reconsideration of the selection of the new candidate. If the commission selects a third candidate, the lord chancellor is required to approve his or her appointment or the appointment of the second candidate (the subject of the reexamination). If after the reexamination, the commission re-selects the second candidate, the lord chancellor is required to approve his or her appointment.
2. The lord chancellor also has the power to request a reexamination of the first candidate whom the commission submits to him or her. In such case, the commission will reconsider the candidate and return to the lord chancellor with its decision. If the commission re-selects the same candidate, the lord chancellor can reject the candidate, but when the commission submits the name of a second candidate, he or she must approve the appointment. On the other hand, if after the reexamination process, the commission has selected a new candidate, and the lord chancellor rejects its selection and requires it to present the name of a third candidate, the lord chancellor can decide whether to appoint the new third candidate or the first candidate (the subject of the reexamination).

Similarly, the legislature requires the secretary of state for justice (lord chancellor) to provide a written explanation for the rejection of any candidate or for the demand for reexamination of his or her candidacy, based solely on professional grounds.<sup>281</sup> Upon approval of the name of a candidate, the lord chancellor provides the name to the prime minister (head of the executive branch), who passes it on, without any discretion, for ceremonial appointment by the queen.<sup>282</sup> Once a judge has been appointed to the Supreme Court, his or her term ends upon reaching the age of 75.<sup>283</sup>

281 Supreme Court (Judicial Appointments) Regulations 2013 amend. 21 (UK).

282 Constitutional Reform Act 2005 art. 23 (UK).

283 Judicial Pensions and Retirement Act 1993 art. 26(7) (UK), at <https://tinyurl.com/yxgnfv7d>.



## Luxembourg

Type of Court	Constitution
Authority to Overturn Statutes	No
Judicial Declaration of a Constitution	No
Method of Selection	Five by a professional commission, with the approval and collaboration of the executive branch, and four based on their statutory positions
Additional Details	Five of the judges are ceremonially appointed by the duke
Term	For life
Elected Public Officials Decide	No
Involvement by Jurists	Binding involvement

The Constitutional Court of Luxembourg is empowered to engage in constitutional review of the country's legislation, but it does not have the power to independently overturn it. It only has the authority to declare it incompatible with the Constitution.<sup>284</sup> The public cannot submit constitutional petitions directly to the Court; the country's other courts refer the issues that the Court hears.

The Constitutional Court consists of nine judges, who are appointed for life and serve on the Court alongside their ordinary judicial positions — the president of the Supreme Court of Justice, the president of the Administrative Court, two judges from the Court of Cassation (an entity that is part of the Supreme Court of Justice and serves as the court of last resort in civil and criminal law cases),<sup>285</sup> and five judges who are ceremonially appointed by the duke (the equivalent of a king). The names of the aforementioned five judges are selected by the government upon the recommendation of a committee of judges chaired by the president of the Supreme Court of Justice.<sup>286</sup> The committee recommends three candidates for each vacancy, from which the government selects the candidate who will be appointed and provides that candidate's name for the ceremonial approval of the Duke.<sup>287</sup> It must be noted that even those candidates who do not serve in defined judicial roles come from the ranks of the judiciary.<sup>288</sup>

284 Jean Thill & Jörg Gerkrath, *The Grand Duchy of Luxembourg*, in CONSTITUTIONAL LAW OF THE EU MEMBER STATES 1085, 1096-1099, 1139-1140 (Leonard Besselink ed., 2014), <https://tinyurl.com/ysoyxnmu>.

285 Pursuant to Article 33 of the Administrative Courts Act (Luxembourg) (Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif) in its current text, the Court of Cassation includes four dedicated judges who are subordinate to the president of the Supreme Court of Justice. The various versions of the statute and the different amendments that were made to it as of the date of its publication are all available on the government of Luxembourg's website, available (in French) at <https://tinyurl.com/y227luhq>.

286 CONSTITUTION OF LUXEMBOURG art. 95ter, available (in French) at <https://tinyurl.com/y54jvhfe>; Constitutional Court Act art. 2 (Luxembourg) (Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle), available (in French) at <https://tinyurl.com/y5jbgrfc>. In 2013, a bill was submitted that was intended to adopt the French model, pursuant to which a committee would be established to recommend candidates for judicial positions. However, this bill has not yet been enacted. For an explanation of the subject, see <https://tinyurl.com/yxnutz3lv>.

287 Constitutional Court Act §3(4) (Luxembourg).

288 *Id.*



## Turkey

Type of Court	Constitution
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	The president of the country (head of the executive branch) and the legislative branch, from a list of candidates formulated primarily by various legal entities
Additional Details	The government is purging large swaths of the public sector, including the judiciary
Term	Twelve years (nonrenewable), but only until age 65
Elected Public Officials Decide	Four judges — yes; eleven judges — no
Involvement by Jurists	Seven judges — none; eight judges — binding involvement

Given the shaky state of the Turkish democracy (and in particular, in the years following the attempted military coup that failed in 2016) and the purge being pushed by Turkish President Erdogan, including among the ranks of the members of the courts and the public administration, it is very difficult to provide an exact explanation of the distribution of power between the country's governmental branches.<sup>289</sup> As a result, this survey will focus on the **language** of the law and the Constitution.

The Constitutional Court of Turkey, which is empowered to overturn laws that are unconstitutional,<sup>290</sup> consists of 15 judges,<sup>291</sup> who serve for one-time terms of 12 years.<sup>292</sup> The threshold condition for the bench is at least 20 years' experience as a private sector attorney, public administration officer, judge, or prosecutor, and alternatively — in service as a rank and file professor. Similarly, every candidate must be at least 45 years old.<sup>293</sup>

Three of the judges are selected by the Grand National Assembly of Turkey (parliament) — two from two lists comprising three names (one list for each vacancy) that the Tax Court formulates — and an additional judge from a list of three candidates from the private sector that the bar associations compile. Judges are selected by a vote wherein it is necessary to obtain an absolute and special majority of two-thirds of all members of the Assembly. If the required majority is not obtained, a second vote is held where an absolute majority must be obtained. If this vote also does not succeed, a third vote is held between the two candidates who received the most votes in the second round, and the candidate who receives an ordinary majority of the votes cast is appointed.<sup>294</sup>

289 For more information regarding the results of the failed coup attempt, including the purge being carried out among the ranks of the judiciary, see the European commission's website at <https://tinyurl.com/yxejb6e9>. See also Carlotta Gall, *Erdogan's Purges Leave Turkey's Justice System Reeling*, N.Y. TIMES, June 21, 2019, <https://tinyurl.com/yzljkr2e>.

290 CONSTITUTION OF THE REPUBLIC OF TURKEY art. 148 at [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf).

291 CONSTITUTION OF THE REPUBLIC OF TURKEY art. 146.

292 Additionally, the judge's term ends upon reaching the age of 65; see CONSTITUTION OF REPUBLIC OF TURKEY art 147.

293 CONSTITUTION OF THE REPUBLIC OF TURKEY art. 146.

294 *Id.*

The 12 remaining judges on the Constitutional Court are selected by the president of the country (head of the executive branch); Three judges are selected from among the members of the Supreme Court of Appeals (the Court of Cassation), two judges are selected from among the members of the Turkish Council of State (the highest administrative court in the country), and three judges (including at least two who have legal training) are selected based on the recommendation of the Higher Education Council from among the country's academics in law, economics, and political science. Each of the above entities compiles a list of three candidates for every judicial vacancy from whom the president selects the judge who will be appointed. Additionally, the president selects four judges from among the country's senior administrative officers, independent attorneys, judges, or prosecutors as he sees fit and subject to his exclusive discretion (as well as the threshold conditions for sitting on the bench as described above).<sup>295</sup> Finally, judges of the Constitutional Court select the president of the Court from among their members for renewable four-year terms.<sup>296</sup>

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*





## Greece

Type of Court	Constitution ("Supreme Special Court")
Authority to Overturn Statutes	Yes
Judicial Declaration of a Constitution	No
Method of Selection	Statutory positions
Additional Details	Most of the appointments are made by lottery; ceremonial appointment by the president of the country (who is not the head of the executive branch)
Term	Ten judges (appointed by lottery) — two years Three judges (who are not appointed by lottery) — until the end of their term in their statutory positions
Elected Public Officials Decide	No
Involvement by Jurists	Binding involvement

As a rule, all of the courts of Greece have the power to engage in constitutional review of legislation. However, other than one special court, all of the courts (**including the country's supreme courts**) may at most ad hoc find a constitutional contradiction in relation to the specific case before them. Such findings do not constitute a binding precedent and are likely to contradict one another. In order to resolve that problem, a Special Supreme Court was established in Greece — a dedicated court for constitutional cases to which **all** of the other courts in the country are subordinate (including the various supreme courts) that, unlike all of the country's other courts, can issue binding rulings that may even overturn legislation in general.<sup>297</sup>

The Special Supreme Court only convenes when it is necessary to adjudicate one of the matters that is within its authority and comprises: the president of the Court of Cassation (Civil and Criminal); the president of the Council of State (the Supreme Court for Administrative Matters); the president of the Court of Audit (this is a special administrative court for matters involving monetary disputes that involve state employees); four judges from the Court of Cassation (selected by lottery); four members of the Council of State (selected by lottery); as well as two professors of law (who are appointed by lottery),<sup>298</sup> all of whom join the panel when the Special Supreme Court convenes to consider the constitutionality of a statute (as well as a number of additional matters that are set forth in the law).<sup>299</sup> The above lotteries are held every two years and not ad hoc prior to each convening of the Special Supreme Court.<sup>300</sup> The Special Supreme Court primarily convenes twice a year and generally hears approximately five to 15 cases.<sup>301</sup>

297 2001 SYNTAGMA [SYN.] [CONSTITUTION] 100 at <https://tinyurl.com/yse6mqck>.

298 According to the response by Prof. Akritas Kaidatzis of the University of Saloniki, an expert in constitutional law, to the Kohelet Forum's questions dated November 21, 2018, these jurists are selected by lot from among all of the line professors in the country's three law schools (Athens, Saloniki, and Komotini) irrespective of their field of expertise. .

299 PHILIPPOS C. SPYROPOULOS & THEODORE P. FORTSAKIS, CONSTITUTIONAL LAW IN GREECE 199-200 (3rd ed. 2017).

300 SYN. 100(2) ; response by Prof. Akritas Kaidatzis of the University of Saloniki, an expert in constitutional law, to the Kohelet Forum's questions dated November 21, 2018.

301 *Id.*

Judges are appointed and promoted within the system (and regardless, judges are appointed to the Special Supreme Court as representatives of the courts on which they serve) by ceremonial presidential order based on the selection by the Supreme Judicial Council. This Council includes the president of the relevant supreme court, judges from the relevant supreme court (who are selected by lottery), and the chief prosecutor who practices before the relevant supreme court, all based on the relevant type of appointment (As to the Court of Cassation, two deputy prosecutors who are selected by lottery also join the Council.).<sup>302</sup>

<sup>302</sup> SYN. 90.



<b>Type of Court</b>	Supreme
<b>Authority to Overturn Statutes</b>	Yes
<b>Judicial Declaration of a Constitution</b>	Yes (the only one from among those countries reviewed)
<b>Method of Selection</b>	A commission where the justices' consent is required for the candidate's selection
<b>Additional Details</b>	Ceremonial appointment by the president of the country (who is not the head of the executive branch)
<b>Term</b>	Up until age 70
<b>Elected Public Officials Decide</b>	No
<b>Involvement by Jurists</b>	Binding involvement

Since the constitutional revolution in 1995, the Israeli Supreme Court has declared for itself the power to engage in constitutional judicial review of the Knesset's legislation.<sup>303</sup> The Supreme Court's 15 justices are ceremonially appointed by the country's president and are selected by the Judicial Selection Committee that comprises the minister of justice (who serves as its chair), an additional minister, two members of Knesset (of which one is customarily a member of the opposition, but this is not obligatory), two representatives selected by the Israel Bar Association's National Committee, and three justices of the Supreme Court (including the chief justice).<sup>304</sup> As of 2008, every appointment to the Supreme Court requires the consent of at least seven members of the committee.<sup>305</sup> This arrangement has given the justices of the Supreme Court veto power in relation to any such appointment.

Each candidate for a position on the Supreme Court must have either served for five years as a District Court judge or have at least 10 years' experience as an attorney, judge, or law professor. Otherwise, he or she must be a prominent legal scholar (even if he or she does not meet the above criteria).<sup>306</sup> Most of the justices of the Supreme Court are selected from among the judges of the District Courts. According to the accepted practice, the most senior judge is appointed to be chief justice of the Court.<sup>307</sup> In Israel, a judge's term ends when he or she reaches the age of 70.<sup>308</sup>

303 CivA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221 (1995). Prior to this decision, the Court only reviewed statutes that were enacted in violation of a procedural law that had required that they be passed by the Knesset by a particular majority.

304 Basic Law: the Judiciary art. 4; §§ 2-16, Courts Law [Consol.], 1984-5744 [hereinafter Courts Law].

305 If not all members of the committee participate in the meeting, the vote on the appointment will be by a majority as long as the number of members voting in favor of the appointment is not less than the number of those voting, less two; See § 7(C)(2), Courts Law; §1, Courts Law (Amend. No. 55), 2008-5768.

306 §2, Courts Law.

307 Eti Weissblei, *The Length of the Tenure of the Chief Justice of the Supreme Court — a Comparative Review*, THE KNESSET RESEARCH AND INFORMATION CENTER 2007, <https://tinyurl.com/y3vxhvv0>.

308 §13(A)(1), Courts Law.





## Part Three — The Countries in the 2018 Democracy Index

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To further expand the scope of this study and as a supplementary review to the above survey of the OECD's member states, we sought to examine the methods by which members of the supreme constitutional courts are selected in a number of other leading democracies around the world. We focused on the 2018 Democracy Index by the Economist Group.<sup>309</sup> In particular, we examined the 30 leading countries in the index.<sup>310</sup> Of those, 24 countries are members of the OECD and therefore, have been reviewed above. Along with those, the survey includes six additional countries who are not members of the organization and who are presented below in the order in which they appear in the ranking.

309 This is the most recent index published by the Economist Group as of the date of the writing of these lines.

310 A review of the 2018 Democracy Index, including the methodology on which it is based, is available on the "The Economist" Group's research department's website available at <https://tinyurl.com/yy7hxlqy>. For the ranking of the first 30 countries in the index, on which we focused, see the relevant table that appears in the appendix to this study.



## Uruguay

Type of court	Supreme
Authority to overturn statutes	No
Judicial declaration of a constitution	No
Method of selection	The legislative branch
Additional details	If the legislature fails to appoint a judge ("minister"), the most senior judge in the system is automatically appointed to the position
Term	Ten years (may be reappointed for an additional term after a five-year cooling-off period), but not past the age of 70
Elected public officials decide	Yes
Involvement by jurists	A customary nonbinding recommendation

The highest court in the Uruguayan legal system is the *Corte Suprema de Justicia* (the Supreme Court of Justice). While it is empowered to engage in judicial review of parliamentary legislation, it does not have the power to declare laws void but only to ignore a law that violates the Constitution in the framework of the case before it.<sup>311</sup> The Supreme Court's comprises five judges,<sup>312</sup> whom the General Assembly (two legislative houses in a joint session) selects by an absolute and special majority of two-thirds of its members.<sup>313</sup> If, at the end of 90 days from the day on which the position has been vacated, a candidate is not selected by the required majority, the most senior judge among the country's appellate courts (the highest level of the judiciary that is not the Supreme Court itself) is **automatically** appointed to the position.<sup>314</sup> Judges serve for a period of 10 years, at the end of which they must wait at least five years before they can be reselected for the position.<sup>315</sup> In any event, the judges must retire upon reaching the age of 70.<sup>316</sup>

Pursuant to the Constitution, candidates for membership on the Supreme Court must be 40 years of age or older and possess at least 10 years' experience as an attorney or at least eight years as a judge or public official.<sup>317</sup> Nevertheless, over the years, a custom has taken root in the country to

311 CONSTITUTION OF URUGUAY arts. 239(1), 256-259, at <https://tinyurl.com/ysygnst3>, and in particular, Article 259 of the Constitution of Uruguay, which indicates this expressly; see also Florencia Antía & Daniela Vairo, *La Suprema Corte de Justicia en Uruguay: Entre Instituciones Formales e Informales* (1985-2018), 24 *OPERA* 27, 37-38 (2019) [hereinafter Study on the Judges of the Supreme Court of Justice in Uruguay].

312 CONSTITUTION OF URUGUAY art. 234.

313 CONSTITUTION OF URUGUAY art. 236.

314 *Id.* This is not a theoretical mechanism. As of 2019, more than four of the appointments to the Supreme Court in the country were made by means of this automatic default mechanism; see the Study on the Judges of the Supreme Court of Justice in Uruguay, *supra* note 315, at 40.

315 CONSTITUTION OF URUGUAY art. 237. With that, because of the fact that up until now, only judges in advanced stages of their professional career have been appointed to serve on the Supreme Court, who were relatively close to retirement age, no judge up until now has been appointed to a second term. In fact, from among the appointments to the Supreme Court up until now, only five have indeed completed the full 10 years of their term, whereas 16 ended their term upon reaching the age of retirement (an additional judge passed away during the course of his term. For further details, see the Study on the Judges of the Supreme Court of Justice in Uruguay, *supra* note 315, at 41-42.

316 CONSTITUTION OF URUGUAY art. 250.

317 CONSTITUTION OF URUGUAY art. 235.

select candidates for the Supreme Court from the judicial branch only and primarily from among the members of the courts of appeal. In fact, since the 1940s, no person has been appointed from outside the legal system to the position of judge on the Supreme Court.<sup>318</sup> Similarly, it appears that the country has a custom where the Supreme Court compiles, for the members of the General Assembly, a list of possible candidates for the position as a **nonbinding** recommendation.<sup>319</sup>

The Supreme Court selects the judges of the appeals courts, with the approval of the senate, by an ordinary majority.<sup>320</sup> If a candidate comes from the public sector, consent for the appointment is required by three out of the five judges, and in any other case, the consent of four out of the five judges is required for the appointment.<sup>321</sup>

318 Héctor Gros Espiell, *El Estatuto Jurídico Del Juez Constitucional: Uruguay*, ESTATUTO JURÍDICO DEL JUEZ CONSTITUCIONAL EN AMÉRICA LATINA Y EUROPA: LIBRO HOMENAJE AL DOCTOR JORGE CARPIZO 613, 619-620 (2012); Leonardo Luzzi & Natalia Gold, *Quiénes son y qué piensan los candidatos a entrar a la Suprema Corte*, EL OBSERVADOR, Feb. 16, 2017, <https://tinyurl.com/yxbzvbeg>. See also the description on the website of the "Archives and Access to Public Information Center" (CAinfo), a volunteer organization in Uruguay that aims to promote transparency and civic involvement in the country, available (in Spanish) at <https://tinyurl.com/y27nptes>.

319 Luzzi & Gold, *supra* note 322.

320 CONSTITUTION OF URUGUAY art. 239(4).

321 *Id.*



## Mauritius

<b>Type of court</b>	Supreme
<b>Authority to overturn statutes</b>	Yes
<b>Judicial declaration of a constitution</b>	No
<b>Method of selection</b>	The chief justice of the Supreme Court — by the president of the country (who is not the head of the executive branch but is elected by the parliament); the senior puisne judge — by the chief justice of the Supreme Court; the remaining puisne judges — by the Judicial and Legal Services Commission
<b>Additional details</b>	Ceremonial appointment by the president of the country (who is not the head of the executive branch but is elected by the parliament)
<b>Term</b>	Up until age 67
<b>Elected public officials decide</b>	Chief justice of the Supreme Court — yes; the remaining puisne judges — no
<b>Involvement by jurists</b>	The chief justice of the Supreme Court — none; the remaining puisne judges — binding involvement by jurists who are themselves appointed by elected public officials

The Supreme Court of Mauritius is the highest court in the land, but its decisions, including regarding constitutional interpretation, may be appealed to the Judicial Committee of the British Privy Council (a vestige of the country's past as a British colony).<sup>322</sup> The Court has the express power to overturn legislation.<sup>323</sup> The Court currently comprises 20 members, including the chief justice, the senior puisne judge, and 18 additional puisne judges.<sup>324</sup> The threshold condition for service on the Supreme Court is at least five years' experience as a barrister (attorney) who is licensed to appear before the Supreme Court.<sup>325</sup>

The country's president (who is not the head of the executive branch but has actual power in this matter) selects the chief justice of the Supreme Court in consultation with the prime minister (the head of the executive branch).<sup>326</sup> While the senior puisne judge is appointed ceremonially

322 CONSTITUTION OF MAURITIUS art. 81. The Judicial Committee of the Privy Council is located in London and serves primarily as the highest Court of Appeal for the current British colonies that constitute an integral part of the United Kingdom. Concomitantly, the committee also serves as a high Court of Appeal (for certain cases) for a small number of former colonies, including Mauritius. The core and majority of the work of the committee is carried out by members of the British Supreme Court, who serve on it contemporaneously with their regular roles. Alongside them on the committee, serve senior judges from other British high courts (courts that are subordinate to the Supreme Court of the UK) as well as retired senior judges from across the states of the Commonwealth, who are appointed by a decision of the president of the Supreme Court of the UK. For more on the subject, see the committee's website at [www.jcpc.uk](http://www.jcpc.uk).

323 CONSTITUTION OF MAURITIUS arts. 2, 17, 83(2).

324 CONSTITUTION OF MAURITIUS art. 76(2).

325 CONSTITUTION OF MAURITIUS art. 77(4).

326 The fact that the president's power in this matter is real may be learned from Articles 64(4) and 77(i) of the Constitution of Mauritius.



by the president, he or she is in fact selected by the chief justice of the Supreme Court. While the remaining puisne judges are ceremonially appointed by the country's president, they are in fact selected by a professional commission,<sup>327</sup> whose members include the chief justice of the Supreme Court (who services the chair), the senior puisne judge, an additional puisne judge selected by the chief justice of the Supreme Court,<sup>328</sup> and the chair of the Public Service Commission, who in turn is selected for the position by the country's president (who has actual power in this matter) after a (nonbinding) consultation with the prime minister and the head of the opposition.<sup>329</sup> By law, the judges serve until they reach the age of 67.<sup>330</sup>

327 CONSTITUTION OF MAURITIUS arts. 77(2)-77(3).

328 CONSTITUTION OF MAURITIUS art. 85(1).

329 CONSTITUTION OF MAURITIUS art. 88(5).

330 CONSTITUTION OF MAURITIUS art. 78(1); Courts Act art. 3(2) (Mauritius), at <https://tinyurl.com/y4akfzjj>. See also the description on the website of the Supreme Court of Mauritius at <https://tinyurl.com/yyxdgccf>.

Type of court	Constitution
Authority to overturn statutes	Yes
Judicial declaration of a constitution	No
Method of selection	Prime minister (head of the executive branch)
Additional details	Ceremonial appointment by the president of the country (who is not the head of the executive branch)
Term	Up until age 65
Elected public officials decide	Yes
Involvement by jurists	The chief justice of the Constitutional Court — none; the remaining judges — a statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials

The Constitutional Court of Malta, which has the power to engage in judicial review of the country's laws,<sup>331</sup> comprises three judges — a chief justice and two additional judges. The process of staffing the court is considered blatantly political, and the prime minister (head of the executive branch) is the one who in fact selects the candidates for appointment.<sup>332</sup> The prime minister selects the chief justice of the Constitutional Court without any involvement by additional entities.<sup>333</sup> The prime minister also selects the two additional judges, but only after he or she has been provided with the recommendation of the Judicial Appointments Committee, most of the members of which are selected by elected public officials.<sup>334</sup> To be precise, the committee's recommendation is **nonbinding**. The prime minister is entitled not to follow the recommendation, but then he or she or the minister of justice must appear before the parliament immediately following the submission of the committee's recommendations and explain why he or she deviated from them. Similarly, he or she must publish these grounds in the official gazette.<sup>335</sup> The judges, who must possess at least 12 years' experience as magistrates/judges or attorneys,<sup>336</sup> are ceremonially appointed by the president of the country (who is not the head of the executive branch) and serve until the age of 65.<sup>337</sup> The Judicial Appointment Committee comprises the following entities:<sup>338</sup> the chief justice of the

331 CONSTITUTION OF MALTA arts. 95(2), 116 at <https://tinyurl.com/hnkhggy>.

332 William Elliot Bulmer, *Constrained Majoritarianism: Westminster Constitutionalism in Malta*, 52 COMMONWEALTH & COMPARATIVE POLITICS 232, 244 (2014).

333 CONSTITUTION OF MALTA arts. 96(1), 96(40) (end).

334 CONSTITUTION OF MALTA art. 96(3).

335 CONSTITUTION OF MALTA art. 96(4).

336 CONSTITUTION OF MALTA art. 96(2).

337 CONSTITUTION OF MALTA arts. 96(1), 97(1).

338 CONSTITUTION OF MALTA art. 96A.

Supreme Court (who serves as chair and as noted, is selected by the prime minister); the attorney general (who is also selected by the prime minister);<sup>339</sup> the auditor general and the commissioner for administrative investigations (ombudsman) (who are both selected by the House of Representatives by an absolute and special majority of two-thirds of the members of the house);<sup>340</sup> and the president of the Chamber of Advocates.

339 CONSTITUTION OF MALTA art. 91(1).

340 CONSTITUTION OF MALTA art. 108(2); Ombudsman Act art. 3 (Malta), at <https://tinyurl.com/y5e9ufuz>.



## Costa Rica

Type of court	Constitutional (a chamber of the Supreme Court possessing characteristics of a constitutional court)
Authority to overturn statutes	Yes
Judicial declaration of a constitution	No
Method of selection	The legislative branch
Additional details	—
Term	Life, with the possibility of political removal every eight years
Elected public officials decide	Yes
Involvement by jurists	No

The Supreme Court of Justice of Costa Rica — the highest court in the land<sup>341</sup> — is divided into four different permanent chambers:<sup>342</sup> one chamber for civil and administrative matters, one chamber for family matters and labor matters, one chamber for criminal matters (each of these three comprising five dedicated magistrates) and, alongside those, the Constitutional Chamber, which comprises seven dedicated magistrates. The Constitutional Chamber has the exclusive power to declare unconstitutional primary legislation void.<sup>343</sup> It can do so retroactively in the framework of a constitutional petition that is before it<sup>344</sup> or proactively, before the law takes effect (for the most part, at the request of at least 10 members of parliament).<sup>345</sup> However, a law may only be proactively overturned if there is a defect in the legislative process, whereas the Constitutional Chamber's ruling that the **content** of a bill is unconstitutional will not be binding upon the legislature.<sup>346</sup>

The magistrates on the Supreme Court of Justice (in all of its chambers) are selected by the parliament by an absolute and special majority of two-thirds of all of its members based on the nonbinding recommendation of the parliamentary appointments committee (which prior thereto publishes the names of the candidates for public comment and summons the candidates

341 CONSTITUTION OF COSTA RICA art. 156, at <https://tinyurl.com/gpvmqvw>.

342 Judicial Powers Law No. 7333 art. 49 (Ley Orgánica del Poder Judicial No. 7333) (Costa Rica), available at <http://pani.go.cr/descargas/leyes/333-ley-7135/file>. See the details of the Supreme Court of Justice's magistrates, by chamber, on the website of the Supreme Court of Justice of Costa Rica, available (in Spanish) at <https://tinyurl.com/y2l4e72n>, as well as on the websites of the various chambers themselves, available through the links on that same page. For a survey of the background to the constitutional reforms that laid the foundation for the permanent Constitutional Chamber, see Robert S. Barker, *Judicial Review in Costa Rica*, 7 Sw. J. L. & Trade Am. 267 (2000).

343 CONSTITUTION OF COSTA RICA art. 10; Judicial Powers Law art. 57 (Costa Rica); Constitutional Jurisdiction Law No. 7135 arts. 4, 13 (Ley de la Jurisdicción Constitucional No. 7135) (Costa Rica), available (in Spanish) at <https://tinyurl.com/y6lboxz7>; Barker, *supra* note 346, at 282-284. Regarding the independence of the Constitutional Chamber from the rest of the country's legal system, see Rubén Hernández Valle, *El Estatuto del Juez Constitucional en Costa Rica*, ESTATUTO JURÍDICO DEL JUEZ CONSTITUCIONAL EN AMÉRICA LATINA Y EUROPA: LIBRO EN HOMENAJE AL DOCTOR JORGE CARPIZO 409, 410 (2012), <https://tinyurl.com/y3cw2czq>.

344 Constitutional Jurisdiction Law arts. 73, 88 (Costa Rica); Barker, *supra* note 346, at 280-281.

345 *Id.* at 281; Constitutional Jurisdiction Law art. 96(b) (Costa Rica).

346 Constitutional Jurisdiction Law art. 101 (Costa Rica).

to a hearing before it).<sup>347</sup> The magistrates are selected for eight-year terms that automatically renew. Similarly, by an absolute and special majority of two-thirds of its members, the Legislative Assembly is entitled to not extend the magistrate's tenure for an additional term.<sup>348</sup> The magistrates must be citizens of the country and above the age of 35 and have engaged in the practice of law for at least 10 years or have served in a judicial role for at least five years.<sup>349</sup> Additionally, a person cannot be appointed to the bench on the Supreme Court of Justice if he or she is a third or lower degree relative of a person already serving on that Court.<sup>350</sup>

Alongside the selection of permanent magistrates, at least 12 dedicated substitute magistrates are also selected for the Constitutional Chamber and serve as temporary appointees in the event that one of the chamber's seats becomes vacant (The specific magistrate who will fill the temporary vacancy is randomly selected by computer software from the list of substitute judges).<sup>351</sup> The substitute magistrates are selected through a process that is identical to the selection of permanent magistrates other than the fact that the parliament selects them from a list of names — two names for each vacancy — that the Supreme Court of Justice compiles. Additionally, the duration of the substitute magistrates' term is shorter and lasts only four years.<sup>352</sup>

347 National Assembly Regulations art. 85(g) (Costa Rica), available (in Spanish) at <https://tinyurl.com/y6djudow>; Hernández, *supra* note 347, at 412-415.

348 CONSTITUTION OF COSTA RICA art. 158.

349 CONSTITUTION OF COSTA RICA art. 159.

350 CONSTITUTION OF COSTA RICA art. 160.

351 Judicial Powers Law arts. 58, 63 (Costa Rica); Hernández, *supra* note 347, at 412.

352 CONSTITUTION OF COSTA RICA art. 164; Judicial Powers Law art. 62 (Costa Rica); Hernández, *supra* note 347, at 415. See also the description on the website of Costa Rica's Constitutional Chamber, available (in Spanish) at <https://tinyurl.com/y36heyxx>.



## Cape Verde (Republic of Cabo Verde)

<b>Type of court</b>	Constitution
<b>Authority to overturn statutes</b>	Yes, there is an override clause in the event that laws are overturned prior to the completion of the legislative process
<b>Judicial declaration of a constitution</b>	No
<b>Method of selection</b>	The legislative branch
<b>Additional details</b>	—
<b>Term</b>	Nine years (nonrenewable)
<b>Elected public officials decide</b>	Yes
<b>Involvement by jurists</b>	No

The Cape Verde Constitutional Court is empowered to overturn legislation that is unconstitutional.<sup>353</sup> It has the ability to do so proactively prior to the law taking effect (at the request of the prime minister or at least 15 members of parliament)<sup>354</sup> or *post facto*, whether in the framework of a petition or appeal being heard before it<sup>355</sup> or whether at the request of one of the following: the president of the republic (one of the heads of the executive branch, who is directly elected), the president of the National Assembly, the prime minister, the attorney general (the ombudsman), or at least 15 members of the National Assembly.<sup>356</sup> When the Court proactively overturns legislation, the National Assembly has the right to reenact the legislation by an absolute and special majority of two-thirds of the members of the chamber.<sup>357</sup> In the event legislation is overturned *post facto*, on the other hand, the Constitution does not include a similar parliamentary override mechanism.<sup>358</sup>

The Constitutional Court is a relatively new institution in the country. Although, its *de jure* establishment was by constitutional amendment in 1999, it was only actually established in 2015.<sup>359</sup> It currently comprises three judges, who are selected by the National Assembly for a one-time term of nine years<sup>360</sup> by a special majority of two-thirds of the vote, which also constitutes an absolute majority of the members of the National Assembly (meaning, two-thirds of the votes cast, which, in Israeli terms, would be at least 61 members of the Knesset).<sup>361</sup>

353 CONSTITUTIONAL COURT LAW art. 11 (Cape Verde), available (in Portuguese) at <https://tinyurl.com/y23ew8rj>. The website of the Cape Verde Constitutional Court lists the statutes that have been overturned, both *post facto* as well as proactively, available (in Portuguese) at <https://tinyurl.com/yysfee4>.

354 CONSTITUTION OF CAPE VERDE arts. 278(1)(b), 279(b), available at <https://tinyurl.com/y6hnou5x>.

355 CONSTITUTION OF CAPE VERDE arts. 281-282; Yuhniwo Ngenge, *Institutional Models for Constitutional Justice in Contemporary West Africa*, in JUDICIAL REVIEW SYSTEMS IN WEST AFRICA: A COMPARATIVE ANALYSIS 45, 50 (2016).

356 CONSTITUTION OF CAPE VERDE art. 280.

357 CONSTITUTION OF CAPE VERDE art. 279(4).

358 CONSTITUTION OF CAPE VERDE arts. 283(2), 284(1); Constitutional Court Law arts. 74, 93 (Cape Verde); Markus Böckenförde, *Watching the Watchdogs*, JUDICIAL REVIEW SYSTEMS IN WEST AFRICA: A COMPARATIVE ANALYSIS 137, 143 (2016).

359 See also the description on the website of Cape Verde's Constitutional Court, available (in Portuguese) at <https://tinyurl.com/y3a492er>.

360 CONSTITUTION OF CAPE VERDE arts. 215(3), 215(5). Pursuant to Article 19(1) of the Constitutional Court Law (Cape Verde), the number of judges on the Court may be increased to five or seven judges.

361 CONSTITUTION OF CAPE VERDE art. 181; Constitutional Court Law art. 19(2) (Cape Verde).



## Botswana

<b>Type of court</b>	Supreme (referred to as the "Court of Appeal")
<b>Authority to overturn statutes</b>	Yes
<b>Judicial declaration of a constitution</b>	No
<b>Method of selection</b>	The judge president of the Court of Appeal — by the president of the country (head of the executive branch); the remaining justices — by the Judicial Service Commission
<b>Additional details</b>	Ceremonial appointment by the country's president (head of the executive branch) for some of the judges
<b>Term</b>	Up until age 70
<b>Elected public officials decide</b>	Chief justice of the Supreme Court — yes; the remaining puisne judges — no
<b>Involvement by jurists</b>	The chief justice of the Supreme Court — none; the remaining puisne judges — binding involvement by jurists who are themselves appointed by elected public officials

The Highest Court in Botswana is the Court of Appeal, which sits as an appellate court for decisions of the High Court (including rulings on constitutional petitions).<sup>362</sup> The Court is empowered to declare legislation void if it is harmful to human rights in violation of the provisions of the Constitution.<sup>363</sup> However, and although it appears that the country's governmental authorities indeed acknowledge this judicial power to overturn legislation, there are also indications that they are, at times, slow to actually implement such rulings. In such a situation, some governmental authorities are likely to continue to act pursuant to the old law despite it having been overturned (on its face, in violation of the Court's instructions). In such case, an aggrieved citizen of course has the right to petition the Court for individual relief.<sup>364</sup>

362 CONSTITUTION OF BOTSWANA arts. 18, 95, 99, 106 at <https://tinyurl.com/y2udj55v>; Court of Appeal Act art. 10 (Botswana), at <https://tinyurl.com/yxh6y9tb>. In fact, the country's legal system operates on a two-pronged model: While the chief justice of the High Court is the administrative head of the system, the judge president of the Court of Appeal and the Court that he heads have the highest legal authority; Bonolo Ramadi Dinokopila, *The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana*, 24 U. BOTSWANA L. J. 3, 11-12 (2017).

363 CONSTITUTION OF BOTSWANA art. 18. The language of the Constitution empowers the High Court to hear constitutional petitions but does not expressly indicate the power to overturn legislation (This is also true in relation to the Court of Appeal pursuant to Article 106 of the Constitution of Botswana.). Nevertheless, the Court has already thus overturned legislation; see *Petrus v. The State*, 1 BLR 14 (1984) (where the Court of Appeal struck down a section in the Botswana Criminal Procedure and Evidence Act that allowed for the punishment of lashing, asserting that it violated the constitutional prohibition against torture); see also *Attorney General v. Dow*, BLR 119 (1992) (where the Court of Appeal struck down a section of the Botswana Citizenship Act pursuant to which a child born to a Botswanan mother would be entitled to citizenship by birth only if the child was born out of wedlock, asserting that this section violated the provisions prohibiting discrimination set forth in the Constitution, as no similar requirements was established for the children of fathers who were citizens of Botswana). See also the language of Article 86 of the Constitution of Botswana, pursuant to which the legislature's right to enact statutes is "subject to the provisions of this Constitution."

364 Charles Fomad, *Botswana: Introductory Notes*, in INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA 17 (2011), <https://tinyurl.com/y3uyvp3c>.

The country's president (head of the executive branch), subject to his or her exclusive discretion, selects the judge president of the Court of Appeal.<sup>365</sup> The other justices on the Court of Appeal, currently eight in number,<sup>366</sup> while officially appointed by the country's president, are in fact selected pursuant to the binding recommendation of the Judicial Service Commission.<sup>367</sup> In addition to these, all of the judges of the High Court also serve on the Court of Appeal (ex officio based on their position in that same Court and in parallel thereto).<sup>368</sup> These judges are appointed to the position in a manner identical to the way justices are selected for the Court of Appeal: The chief justice of the High Court is selected solely by the country's president,<sup>369</sup> whereas the other judges of the High Court, currently 16 in number,<sup>370</sup> are appointed by the president upon the binding recommendation of the Judicial Service Commission.<sup>371</sup> Judges serve until they reach the age of 70.<sup>372</sup>

The Judicial Service Commission comprises six members:<sup>373</sup> The chief justice of the High Court (who serves as chair), the judge president of the Court of Appeal (if this position is held by the chief justice of the High Court, the most senior judge in the Court of Appeal will be appointed to the commission), the attorney general (who is selected by the country's president at his or her exclusive discretion),<sup>374</sup> the chair of the Public Service Commission (who is selected by the country's president at his or her exclusive discretion),<sup>375</sup> a representative of the Law Society, and a non-atorney citizen who is also selected by the country's president.

Recently, in 2017, the Court of Appeal addressed the question of whether the country's president is obligated to appoint the candidate recommended by the Judicial Service Commission or whether he or she may refuse the appointment. The then president of the country refused to appoint the candidate who was recommended for the Court of Appeal by the commission. The judge petitioned the High Court, which decided that the president had the power to refuse the appointment. The decision was appealed to the Court of Appeal which reversed the decision and held (contrary to the position of both the president as well as the commission) that the president of the country is obligated to appoint the candidate decided upon by the commission and that he or she does not have discretion in the matter other than for considerations of security that he or she must specify to the commission through the attorney general.<sup>376</sup>

365 BOTSWANA CONSTITUTION §100(1); Dinokopila, *supra* note 366, at 10.

366 *Id.*; see also the description on the website of the Botswana Ministry of Justice at <https://tinyurl.com/y6jpm5bh>.

367 CONSTITUTION OF BOTSWANA §100(2).

368 CONSTITUTION OF BOTSWANA §99(2).

369 CONSTITUTION OF BOTSWANA §96(1); Dinokopila, *supra* note 366, at 7-8. We emphasize that pursuant to Section 99(2)(c) of the Constitution of Botswana, its legislature can decide that the same person will serve as both chief justice of the High Court as well as the judge president of the Court of Appeal (see also CONSTITUTION OF BOTSWANA §100(1)). Currently, two different people serve as the heads of each of these two courts.

370 See the description on the website of the Botswana Ministry of Justice at <https://tinyurl.com/y6jpm5bh>. Pursuant to the provisions of High Court Law §3(1) (Botswana), at <https://tinyurl.com/yxskos23>, no more than 30 justices may be appointed to serve on said court.

371 CONSTITUTION OF BOTSWANA §Section 96(2).

372 CONSTITUTION OF BOTSWANA §§Sections 97(1), 101(1) (relating to members of the High Court and the Court of Appeal, respectively).

373 CONSTITUTION OF BOTSWANA §Section 103.

374 CONSTITUTION OF BOTSWANA §Section 51(1).

375 CONSTITUTION OF BOTSWANA §Section 109(2).

376 *Law Society of Botswana v. The President*, Civil Appeal No. CACGB-031-16, at <https://tinyurl.com/yyz67spk>. For a description of the case, see Utlwanang Gasennelwe, *4 Court of Appeals Judges "Separately" Rule Against Khama*, WEEKEND POST, May 2, 2017, <https://tinyurl.com/y33nhget>; Dinokopila, *supra* note 366, at 8.





## Part Four— The Individual States of the United States of America

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In the individual states of the United States, different methods for selecting judges for the highest state courts are followed. These methods fall into four primary categories:

1. Direct elections by the public at large.
2. Selection by elected public officials.
3. Selection by elected public officials by means of a professional commission (the majority of whose members are appointed by elected public officials).
4. Selection by the state governor with the involvement of a professional commission (the majority of whose members are not appointed by elected public officials) and ratified in direct elections by the public at large.

As it is the method employed in 22 states, the direct election method is the most widespread. In four states, elected public officials are the ones who select the judges, without the involvement of a professional commission. In 24 states, a professional commission is involved in the appointment process and submits a short list of candidates to elected public officials who select from it the candidate to be appointed. With that, in 16 of those states, the elected public officials appoint the majority of the commission members. In addition, out of those 16 states, in one, the appointment undergoes a retention process before the legislative houses at the end of each term, and in eight, direct retention elections by the public at large are held usually up to two years from the date of appointment. Finally, in eight states, the governor selects the judges with the involvement of a professional commission, the majority of whose members are **not** appointed by elected public officials. Nevertheless, **in all of those states**, the judges stand for general retention elections by the public at large usually very close to the date of appointment as well as for recurring retention elections at the end of each term (usually, every six to 12 years). We further emphasize that even in the states that fall into the fourth category, in most cases, the professional legal entity that is involved in the appointment process is the bar associations of the respective states and not the representatives of their judiciary branches.

Thus, **in all of the individual states of the United States, the process of selecting judges to the supreme courts is placed in the hands of the public**, whether by direct elections or by means of its democratically-elected representatives, either in an election procedure itself or through a process of ratification thereof. Even in states in which there is binding involvement of professional entities, the judges face general retention elections close to the date of their appointment in order to ensure democratic legitimization of their service.<sup>377</sup> Moreover, we note that the decisions of the supreme courts in the various states are subordinate to the federal Supreme Court, whose justices, as mentioned above, are selected in a blatantly political process. The details of the processes to select judges to the supreme courts of the individual states of the United States will be set forth below according to the four categories delineated above.

## 1. Direct Democratic Elections

1. **Ohio** — Seven justices serve on the Supreme Court. Although, it would seem, the candidates run in direct, nonpartisan, general elections (meaning, they run on their own behalf and not on behalf of a particular party), in practice, they are selected in primaries by the various parties in the state. Therefore, the Supreme Court justices in the state are **actually** selected in direct, partisan, general elections. The justices serve for six-year terms, at the end of which they must run for reelection to their posts (in a procedure identical to that of the first election).<sup>378</sup> The retirement age for justices is 70.<sup>379</sup>
2. **Alabama** — On the Supreme Court sit nine justices who are elected in direct, partisan, general elections. Meaning, ab initio, the candidates run in elections on behalf of particular parties (the Democratic Party, the Republican Party, or some other party) after having been selected in primaries or as independents.<sup>380</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts (again, in direct, partisan, general elections). The retirement age for justices is 70.<sup>381</sup>
3. **Texas** — On the Supreme Court sit nine justices who are elected in direct, partisan, general elections.<sup>382</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts (again, in direct, partisan, general elections). The retirement age for justices is 75.<sup>383</sup>
4. **Michigan** — Seven justices serve on the Supreme Court. Although, it would seem, the candidates run in direct, nonpartisan, general elections (meaning, they run on their own behalf and not on behalf of a particular party), in practice they are selected in primaries by the

377 In this aspect, our conclusion differs from prior reviews, which neglected to properly address the involvement of elected public officials in the appointment of the members of professional commissions and the holding of direct retention elections in a good number of countries. Lurie, *The Method of Judicial Selection in Israel and the World — Comparative Background*, supra note 13; Lurie, *The Judicial Selection Committee*, supra note 12.

378 OHIO CONSTITUTION art. 4, §§2, 6, 13, at <https://tinyurl.com/y5yutwdn>; OHIO REV. CODE ANN. §§ 3501.01, 3505.04, 3513.05, 3513.22, at <http://codes.ohio.gov/orc/35>.

379 OHIO CONSTITUTION art. 4, §6.

380 ALABAMA CONSTITUTION §§151, 158 at <https://law.justia.com/constitution/alabama>; ALA. CODE §§ 12.2.1, 17.12.22, 17.13.18, at <https://law.justia.com/codes/alabama/2018>.

381 ALABAMA CONSTITUTION §155.

382 TEXAS CONSTITUTION art. 5, §§2, 28 at <https://tinyurl.com/y4y8gxkk>; TEX. ELEC. CODE ANN. §§ 172.002-172.004, at <https://tinyurl.com/y39ky390>; TEX. ELEC. CODE ANN. §2.001, available at: <https://tinyurl.com/y688xbv5>.

383 TEXAS CONSTITUTION art. 5, §1a.

various parties in the state. Therefore, the Supreme Court justices in the state are **actually** selected in direct, partisan, general elections.<sup>384</sup> The justices serve for eight-year terms, at the end of which they must run for reelection to their posts (in a procedure identical to that of the first election). The retirement age for justices is 70.

5. **New Mexico** — On the Supreme Court sit five justices who are elected in direct, partisan, general elections. The justices serve for eight-year terms. At the end of his or her term, the justice stands for direct, general **retention** elections. In order to serve an additional term, the justice must receive at least 57% of the votes cast in the retention elections.<sup>385</sup> There is no mandatory retirement age for justices in the state.
6. **Pennsylvania** — On the Supreme Court sit seven justices who are elected in direct, partisan, general elections. The justices serve for ten-year terms. At the end of his or her term, the justice stands for direct, general retention elections. In order to be able to serve an additional term, it is enough for the justice to receive an ordinary majority of the votes cast in the **retention** elections.<sup>386</sup> The retirement age for justices is 75.<sup>387</sup>
7. **North Carolina** — On the Supreme Court sit seven justices who are elected in direct, partisan, general elections. The justices serve for eight-year terms, at the end of which they must run for reelection to their posts (again, in direct, partisan, general elections).<sup>388</sup> The retirement age for justices is 72.<sup>389</sup>
8. **Illinois** — The state is divided into five judicial districts (which do not overlap the administrative division of the state into counties or its division into voting districts for purposes of federal elections).<sup>390</sup> Seven judges serve on the Supreme Court: three judges from Cook County (which includes Chicago) and one judge each from the remaining four counties, who are all elected in direct, partisan, **county** elections. The judges serve for ten-year terms, at the end of which they must stand for direct, county, **retention** elections. In the retention elections, the justice must receive at least 60% of the votes cast.<sup>391</sup> There is no mandatory retirement age for justices in the state.
9. **Louisiana** — The state is divided into seven judicial election districts (which do not overlap the administrative division of the state into counties or its division into voting districts for purposes of federal elections). Seven justices serve on the Supreme Court: each district elects one justice in direct, partisan, **county** elections.<sup>392</sup> The justices serve for ten-year terms, at the end of which they must stand for reelection to their posts (again, in direct, partisan, county elections). The retirement age for justices is 70.<sup>393</sup>

384 MICHIGAN CONSTITUTION art. 6, §2, at <https://tinyurl.com/y6d2ru4n>; Mich. Comp. Laws §§ 168.392, 168.397, 168.404 at <https://tinyurl.com/y5n7kuos>.

385 NEW MEXICO CONSTITUTION art. 6, §§4, 33, 35 at <https://tinyurl.com/yxr8lsgo>; NM STAT. §1.8.1, at <https://tinyurl.com/lyola733>; NM STAT. §1.13.11, at <https://tinyurl.com/y43wm6bn>.

386 PENNSYLVANIA CONSTITUTION arts. 5, §§2, 13, at <https://tinyurl.com/yxpkgx44>; 42 PA. CONS. STAT. §3153, at <https://tinyurl.com/yytu9xma>.

387 PENNSYLVANIA CONSTITUTION art. 5, §16.

388 NORTH CAROLINA CONSTITUTION art. 4, §§6, 16, 19 at <https://tinyurl.com/y2jvm87c>; N.C. GEN. STAT. §163.321, at <https://tinyurl.com/yxs84fb3>; N.C. GEN. STAT. §163.322, at <https://tinyurl.com/y4l6wf9e>.

389 N.C. GEN. STAT. §7a.4.20, at <https://tinyurl.com/y30356gc>.

390 ILLINOIS CONSTITUTION art. 6, §2, at [www.ilga.gov/commission/lrb/con6.htm](http://www.ilga.gov/commission/lrb/con6.htm).

391 ILLINOIS CONSTITUTION art. 6, §§ 3, 10, 12; ILL. COMP. STAT. 5/7.59(a at <https://tinyurl.com/y5504uv6>. For a relevant map of the districts, see [www.illinoisjudges.net/subhead\\_maps.htm](http://www.illinoisjudges.net/subhead_maps.htm).

392 LOUISIANA CONSTITUTION art. 5, §§ 3-4, 22, at <https://tinyurl.com/y3a8r6tm>; LA. REV. STAT. ANN. §§ 18.511A, 18.512A, 18.551D, at <http://legis.la.gov/Legis/Law.aspx?d=81637>; La. Rev. Stat. Ann. §13.101, at <http://legis.la.gov/Legis/Law.aspx?d=76718>.

393 LOUISIANA CONSTITUTION art. 5, §23.

10. **Oregon** — On the Supreme Court sit seven judges who are elected in direct, nonpartisan, general elections. Meaning, while the candidates generally ascribe to a particular ideology, they do not run on behalf of a political party.<sup>394</sup> The judges serve for six-year terms, at the end of which they must run for reelection to their posts. The retirement age for judges is 75.<sup>395</sup>
11. **Idaho** — On the Supreme Court sit five justices who are elected in direct, nonpartisan, general elections.<sup>396</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
12. **Arkansas** — On the Supreme Court sit seven justices who are elected in direct, nonpartisan, general elections.<sup>397</sup> The justices serve for eight-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
13. **Georgia** — On the Supreme Court sit nine justices who are elected in direct, nonpartisan, general elections.<sup>398</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
14. **North Dakota** — On the Supreme Court sit five justices who are elected in direct, nonpartisan, general elections. The justices serve for ten-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.<sup>399</sup>
15. **Washington** — On the Supreme Court sit nine justices who are elected in direct, nonpartisan, general elections.<sup>400</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts. The retirement age for justices is 75.
16. **Wisconsin** — On the Supreme Court sit seven justices who are elected in direct, nonpartisan, general elections.<sup>401</sup> The justices serve for ten-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
17. **West Virginia** — On the Supreme Court of Appeals — the highest court in the state — sit five justices who are elected in direct, nonpartisan, general elections. Until 2015, the justices were elected in direct, partisan, general elections, but that method was changed, and today, only one of the five sitting justices was elected under the old method. Nevertheless, the remaining four justices who, *prima facie*, ran for their positions on their own

394 OREGON CONSTITUTION art. 7, §§2, 4 at [www.oregonlegislature.gov/bills\\_laws/Pages/OrConst.aspx](http://www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx); OR. REV. STAT. §254.005(8), at [www.oregonlaws.org/ors/254.005](http://www.oregonlaws.org/ors/254.005); OR. REV. STAT. §254.065(1), at [www.oregonlaws.org/ors/254.065](http://www.oregonlaws.org/ors/254.065).

395 OREGON CONSTITUTION art. 7, §1a. See also the review available at [https://ballotpedia.org/Mandatory\\_retirement](https://ballotpedia.org/Mandatory_retirement) (Unless otherwise noted, data on the retirement age of judges in the state supreme courts in the United States are based on what is provided at this link.).

396 IDAHO CONSTITUTION art. 5, §6, at <https://tinyurl.com/yy9kv4oc>; IDAHO CODE ANN. §34.905, at <https://tinyurl.com/y48yrwbz>; IDAHO CODE ANN. §34.1217, at <https://tinyurl.com/y3lqzf99>; IDAHO CODE ANN. §34.1215, at <https://tinyurl.com/y3dsrnta>; IDAHO CODE ANN. §1.2101, at <https://tinyurl.com/yy7hhlmg>.

397 ARKANSAS CONSTITUTION amend. 80, §18, a: <https://tinyurl.com/y882qbd>.

398 GEORGIA CONSTITUTION art. 6, §7, at <https://tinyurl.com/y2b7sotx>; GA. CODE ANN. §21.2.170, at <https://tinyurl.com/y48tn32x>; GA. CODE ANN. §21.2.501, at <https://tinyurl.com/yyy70pvc>.

399 NORTH DAKOTA CONSTITUTION art. 5, §§2,7,13 available at [www.legis.nd.gov/constit/a06.pdf](http://www.legis.nd.gov/constit/a06.pdf); N.D. Cent. Code §§ 16.1.06, 16.1.01.11, at [www.legis.nd.gov/cencode/t16-1.html](http://www.legis.nd.gov/cencode/t16-1.html).

400 WASHINGTON CONSTITUTION art. 4, §§3,8 at <https://tinyurl.com/yxvpddxj>; WASH. REV. CODE §§ 29A.36.171, 29A.52.231, 29A.60.221, at <https://tinyurl.com/yy448xvl>.

401 WISCONSIN CONSTITUTION art. 7, §§4,9, at <https://tinyurl.com/y5ryk7ds>; WIS. STAT. §§ 5.01(3), 5.02(21), 5.58(3), 5.60(1), 8.11(3), at <https://tinyurl.com/y6p48ttx>.

behalf and not as partisan candidates — are in fact identified as Democrats or Republicans.<sup>402</sup> The justices serve for 12-year terms, at the end of which they must run for reelection to their posts.<sup>403</sup> There is no mandatory retirement age for justices in the state.

18. **Montana** — On the Supreme Court sit seven justices who are elected in direct, nonpartisan, general elections.<sup>404</sup> The justices serve for eight-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
19. **Minnesota** — On the Supreme Court sit seven judges who are elected in direct, nonpartisan, general elections.<sup>405</sup> The judges serve for six-year terms, at the end of which they must run for reelection to their posts. The retirement age for judges is 70.<sup>406</sup>
20. **Nevada** — On the Supreme Court sit seven justices who are elected in direct, nonpartisan, general elections.<sup>407</sup> The justices serve for six-year terms, at the end of which they must run for reelection to their posts. There is no mandatory retirement age for justices in the state.
21. **Mississippi** — The state is divided into three judicial election districts (which do not overlap the administrative division of the state into counties or its division into voting districts for purposes of federal elections). Nine judges serve on the Supreme Court: Each district elects three judges in direct, nonpartisan, **county** elections. The judges serve for eight-year terms, at the end of which they must stand for reelection to their posts (again, in direct, nonpartisan, county elections).<sup>408</sup> There is no mandatory retirement age for judges in the state.
22. **Kentucky** — The state is divided into seven judicial election districts (which do not overlap the administrative division of the state into counties or its division into voting districts for purposes of federal elections). Seven justices serve on the Supreme Court: Each district elects one justice in direct, nonpartisan, **county** elections. The justices serve for eight-year terms, at the end of which they must stand for reelection to their posts (again, in direct, nonpartisan, county elections).<sup>409</sup> There is no mandatory retirement age for justices in the state.

402 Two of the justices, Tim Armstead and Evan Jenkins, even held political posts in the past, the former as a Republican member of the West Virginia House of Delegates and the latter as a member of the West Virginia House of Delegates and West Virginia Senate (during most of which period, he was associated with the Democrats, and toward the end of which period, he switched to the Republican camp), and then later also as a Republican congressman in the federal House of Representatives. See, respectively [https://ballotpedia.org/Tim\\_Armstead](https://ballotpedia.org/Tim_Armstead) and [https://ballotpedia.org/Evan\\_Jenkins](https://ballotpedia.org/Evan_Jenkins).

403 WEST VIRGINIA CONSTITUTION art. 8, §8, at <https://tinyurl.com/yxw8ajs4>; W. VA. CODE §3-5-4, at <https://tinyurl.com/yya8oe3d>; W. VA. CODE §3-6-11, at <https://tinyurl.com/yyh36se4>.

404 MONTANA CONSTITUTION art. 7, §§7,8, at <https://tinyurl.com/y2cpjs3c>; MONT. CODE ANN. §§ 13-14-111, 13-14-117, 13-15-507, 3-1-1001, at <https://leg.mt.gov/bills/mca/index.html>.

405 MINNESOTA CONSTITUTION art. 6, §§2, 7-8, at [www.revisor.mn.gov/constitution/#article\\_6](http://www.revisor.mn.gov/constitution/#article_6); MINN. STAT. §204B.06:6, at [www.revisor.mn.gov/statutes/2010/cite/204B.06](http://www.revisor.mn.gov/statutes/2010/cite/204B.06); MINN. STAT. §204D.10:3, at [www.revisor.mn.gov/statutes/cite/204D.10](http://www.revisor.mn.gov/statutes/cite/204D.10); MINN. STAT. §208.05, at [www.revisor.mn.gov/statutes/cite/208.05](http://www.revisor.mn.gov/statutes/cite/208.05).

406 MINNESOTA CONSTITUTION art. 6, § 9; MINN. STAT. § 490.125 (2020).

407 NEVADA CONSTITUTION art. 6, §§3, 20, at <https://tinyurl.com/y4usvkvf>; NEV. REV. STAT. §§ 293.260, 293.400, at <https://tinyurl.com/y45beb4k>.

408 MISSISSIPPI CONSTITUTION art. 6, §§145, 145B, 149, 177 at <https://law.justia.com/constitution/mississippi>; MISSISSIPPI CODE ANN. §23-15-976, at <https://tinyurl.com/yxe6nfbx>; MISS. CODE ANN. §23-15-981, at <https://tinyurl.com/y5dfirg4>; MISS. CODE ANN. §9-3-1, at <https://tinyurl.com/yysw74hc>.

409 KENTUCKY CONSTITUTION §§110, 117-118, at <https://apps.legislature.ky.gov/law/constitution>; KY. REV. STAT. ANN. §§ 21A.010, 21A.020, at <https://tinyurl.com/ytyw82ss2>.

## 2. Selection by Elected Public Officials

- 23. Virginia** — There are seven justices on the Supreme Court, who are selected by both legislative houses by an ordinary majority in each house.<sup>410</sup> The justices serve for 12-year terms, after which it is up to the legislative houses to re-elect them to additional terms according to the same procedure. The retirement age for justices is 73.
- 24. Maine** — There are seven justices on the Supreme Judicial Court, who are selected by the governor, subject to legislative approval as follows: The governor submits the name of the candidate to a legislative committee comprising members from both legislative houses. The committee may either approve or reject the appointment by an ordinary majority of the votes cast. The committee's decision is turned over to the state Senate, which may reverse it by a special majority of two-thirds of the votes cast. If the Senate does not reverse the committee's decision, the justice is appointed to a seven-year term, after which the governor may nominate the same justice a second time according to the same exact procedure.<sup>411</sup> There is no mandatory retirement age for justices in the state.
- 25. New Jersey** — There are seven justices on the Supreme Court, who are selected by the governor, subject to legislative approval as follows: The governor submits the name of the candidate to a dedicated state Senate legislative committee, which gives its opinion on the appointment (and may recommend approving or rejecting it — a nonbinding recommendation). The governor's decision is turned over to the state Senate, together with the committee's opinion, where the candidate must be approved by an absolute majority of the state senators in order to win an additional term. The appointed justice serves for seven years, after which, he or she stands for **retention** through a procedure that is identical to that by which he or she was appointed. A justice, whose appointment was retained, may serve until age 70.<sup>412</sup>
- 26. South Carolina** — There are five justices on the Supreme Court, who are selected by both legislative houses by an ordinary majority in a joint public vote. The justices are selected out of a candidate list that is compiled by a 10-member commission, the majority of which comprises elected public officials (in addition to a number of ordinary citizens who are appointed by elected public officials). Five of the commission members are appointed by the speaker of the House of Representatives (three of whom are elected public officials and two are ordinary citizens), three are appointed by the chair of the state Senate judiciary committee (a legislative committee), and two are appointed by the president of the state Senate (Out of the five commission members who are appointed by senators, three are elected public officials and two are ordinary citizens.). The justices serve for 10-year terms, after which the legislative houses may re-elect them to additional terms according to the same procedure.<sup>413</sup> The retirement age for justices is 72.<sup>414</sup>

410 VIRGINIA CONSTITUTION art. 6, §7, at <https://tinyurl.com/y2bf93wt>; VA. CODE ANN. §17.1-303, at <https://tinyurl.com/y4jmyzba>; VA SENATE RULES §18(C), at <https://tinyurl.com/y5okycx7>.

411 MAINE CONSTITUTION art. 5, part first, §8; MAINE CONSTITUTION art. 6, §§4,6, at [www.maine.gov/legis/const/#a5](http://www.maine.gov/legis/const/#a5); GOVERNOR OF MAINE EXECUTIVE ORDER dated May 14, 2003, available <https://tinyurl.com/y2na3fh3>.

412 NEW JERSEY CONSTITUTION art. 6, §§2,6, at <https://tinyurl.com/y4jdlfmb>; NJ SENATE HOUSE RULES §20, at <https://tinyurl.com/y22cwa74>.

413 SOUTH CAROLINA CONSTITUTION art. 5, §§3,18,27, at [www.scstatehouse.gov/sconstitution/AoS.pdf](http://www.scstatehouse.gov/sconstitution/AoS.pdf); S.C. CODE ANN. §2-19-80(C), at [www.scstatehouse.gov/code/to2c019.php](http://www.scstatehouse.gov/code/to2c019.php).

414 S.C. CODE ANN. §9-8-40, a: [www.scstatehouse.gov/code/to9c008.php](http://www.scstatehouse.gov/code/to9c008.php).

### 3. Selection by Elected Public Officials by Means of a Professional Commission (the Majority of Whose Members Are Appointed by Elected Public Officials)

*In eight of the states that are included in this category, the judges — who are selected by means of a professional commission (the majority of whose members are appointed by elected public officials) — are required, after they are appointed, to stand for direct retention elections by the state's residents.*

- 27. Oklahoma** — There are nine justices on the Supreme Court, who are selected by the governor. The justice is selected from a list of three candidates that is compiled by a professional commission comprising 15 members: six attorneys who are appointed by the bar association; nine citizens who are not attorneys, six of whom are appointed by the governor (who may not appoint more than three commission members expressly affiliated with a particular political party); one who is appointed by the president of the state Senate; one who is appointed by the speaker of the state House of Representatives, and one who is appointed by the commission itself. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election after his or her appointment<sup>415</sup> and afterward, for recurring retention elections every six years.<sup>416</sup> There is no mandatory retirement age for justices in the state.
- 28. Arizona** — There are seven justices on the Supreme Court, who are selected by the governor. The justice is selected by the governor from a list of at least three candidates that is compiled by a professional commission comprising 16 members: five attorneys who are selected by the bar association and appointed on the approval of the Senate (by an ordinary majority); 10 ordinary citizens who are not attorneys who are appointed by the governor with the approval of the Senate (by an ordinary majority); and one chair — the chief justice of the state Supreme Court or his or her representative. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of two years as of the date of his or her appointment and afterward, for recurring retention elections every six years.<sup>417</sup> The retirement age for justices is 70.<sup>418</sup>
- 29. Tennessee** — There are five justices on the Supreme Court, who are selected by the governor with the approval of the General Assembly (both legislative houses) by an ordinary majority. The governor selects the justice from a list of three candidates compiled by a professional commission. If the governor is unsatisfied with the names that are selected by the commission, he or she may request an additional list of three candidates as well, and select, within 60 days, one out of these six candidates. The commission comprises 11 members, who are selected by the governor, eight of whom must be attorneys. The appointed justice must **face direct retention elections** by the residents of the state in the

415 Such elections are held biannually. If one or more years elapse between the date of the appointment and the date of the first general elections thereafter, retention elections will be held in the framework of those first general elections (meaning, at most, two years after the appointment). However, if said first general elections are held less than one year from the date of the appointment, the appointed justice will continue to serve regularly until the date of the **second** general elections after the appointment (meaning, at most, a term of three years), and only then will retention elections be held.

416 OKLAHOMA CONSTITUTION art. 7, §§2,7, at <http://oklegal.onenet.net/okcon/VII.html>; OKLAHOMA CONSTITUTION art. 7B, §3, at <http://oklegal.onenet.net/okcon/VII-B.html>; OKLA. STAT., tit. 20, ch. 1A, §30.18, at <https://law.justia.com/codes/oklahoma/2014/title-20/>.

417 ARIZONA CONSTITUTION art. 6, §§4,36,37 at [www.azcourts.gov/jnc/ConstitutionalProvisions.aspx](http://www.azcourts.gov/jnc/ConstitutionalProvisions.aspx).

418 ARIZONA CONSTITUTION art. 6, §39.

framework of the state's first general election after his or her appointment and afterward, for recurring retention elections every eight years.<sup>419</sup> There is no mandatory retirement age for justices in the state.

30. **Utah** — There are five justices on the Supreme Court, who are selected by the governor upon the approval of the Senate (by an absolute majority). The governor selects the justice out of a list of at least three candidates that a professional commission of eight members compiles. The commission comprises: seven members appointed by the governor, out of whom no more than four are attorneys (but at least two of those appointed are out of a list of six attorneys that the bar association puts together), and a single representative who is appointed by the chief justice of the Supreme Court from among the members of the law council (a body parallel to the Israeli Administration of Courts that mostly comprises serving justices). In contrast to the other commission members, that single representative does not have the right to vote. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of three years of the date that he or she was appointed and afterward, for recurring retention elections every 10 years.<sup>420</sup> The retirement age for justices is 75.<sup>421</sup>
31. **Maryland** — The state is divided into seven judicial election districts (which do not overlap the administrative division of the state into counties or its division into voting districts for purposes of general elections). Seven judges — who are selected by the governor with the approval of the Senate (by an ordinary majority) — serve on the Court of Appeals, the highest court in the state.<sup>422</sup> Each judge is appointed for a different judicial district. The judge is selected by the governor from a list of three candidates that is compiled by a professional commission comprising 17 members: 12 who are appointed by the governor and five who are selected by the bar association. The appointed judge must **face direct retention elections** by the residents of the **judicial election district** in the framework of the state's first general election within one year of the date on which the vacancy occurred and afterward, for recurring district retention elections every 10 years. The retirement age for justices is 70.<sup>423</sup>
32. **Nebraska** — There are seven justices on the Supreme Court, who are selected by the governor. The governor selects the justices from a list of at least two candidates whom the professional commissions nominate for each judicial position. The state is divided into six judicial districts, each of which has its own commission.<sup>424</sup> Alongside this, there is a dedicated commission (general, not district) for the appointment of the chief justice of the Supreme Court. The commissions nominate their candidates to the governor, who selects and appoints, according to their recommendation, the chief justice of the Court and six justices, one from each district. Each of the commissions comprises six members: Four ordinary citizens who are not jurists who are appointed by the governor; four attorneys who are selected by the Bar Association; and the chairperson who is appointed by the governor from among the members of the Supreme Court themselves but is not entitled to vote. No more than four members of each commission may be affiliated with

419 TENNESSEE CONSTITUTION, art. 5, §3 at [www.capitol.tn.gov/about/docs/TN-Constitution.pdf](http://www.capitol.tn.gov/about/docs/TN-Constitution.pdf).

420 UTAH CONSTITUTION, art. 8, §§8,9 at <https://tinyurl.com/yyslnm9>; UTAH CODE ANN. §78A-10, at <https://tinyurl.com/yxscmjpv>.

421 UTAH CODE ANN. §49-18-701, at <https://tinyurl.com/yvhdyffb>.

422 MARYLAND CONSTITUTION art. 4, §§5,5a,b, at <https://tinyurl.com/y53dles8>; GOVERNOR OF MARYLAND EXECUTIVE ORDER No. 01.01.2008.04, available at: <https://tinyurl.com/y44jflfr>.

423 MARYLAND CONSTITUTION art. 4, §3.

424 Division of the state into judicial districts is not connected to its division into administrative districts or voting districts for purposes of general elections.



the same political party. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of three years from the date of appointment and afterward, for recurring retention elections every six years. The associate justices stand for retention elections before their district electorate, whereas the chief justice stands for retention before the **general state electorate**.<sup>425</sup> There is no mandatory retirement age for justices in the state.

- 33. Florida**— There are seven justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three to six candidates that the professional commission nominates. The commission comprises nine members who are appointed by the governor: five according to his or her discretion (two of whom must be attorneys) and four on the binding recommendation of the bar association. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of one year of the date of appointment and afterward, for recurring direct retention elections every six years.<sup>426</sup> The retirement age for justices is 75.<sup>427</sup>
- 34. Colorado** — There are seven justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three candidates whom the professional commission nominates. The commission comprises 16 members: the chief justice of the state Supreme Court who serves as the chair but is not entitled to vote; seven attorneys (one for each of the state's counties) who are selected by a majority of a committee that comprises the chief justice of the state Supreme Court, the governor, and the state attorney general; and eight ordinary, non-jurist citizens (one for each of the state's counties; and an additional citizen who is not associated with any county) who are selected solely by the governor. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of two years of the date of his or her appointment and afterward, for recurring retention elections every 10 years.<sup>428</sup> The retirement age for justices is 72.<sup>429</sup>

*In the remaining states in this category, judges are selected by means of a professional commission the majority of whose members are appointed by elected public officials and without an additional requirement of retention elections by state residents.*

- 35. Delaware**— There are five justices on the Supreme Court, who are selected by the governor upon the approval of the Senate (by an absolute majority). The governor selects the justice from a list of at least three candidates that the professional commission compiles. The commission<sup>430</sup> comprises 11 members: 10 who are selected by the governor — out of whom at least four are not attorneys and four are attorneys — and one representative who is selected, in practice, by the state's bar association (even though he or she is officially appointed by the governor). In addition, the state's constitution limits the governor's power to appoint justices.<sup>431</sup> At any given time, three out of the five justices of the Supreme Court must belong to one of the major parties in the state (as reflected in the general elections), whereas the remaining two must belong to the second of these two parties. Considering

425 NEBRASKA CONSTITUTION art. 5, §21, at <https://tinyurl.com/yxwkjeqm>; NEB. REV. STAT. §§ 24-803, 24-816, at <https://tinyurl.com/y6vjrr4h>.

426 [Florida Constitution](#) art. 5, §§10,11,20, at [www.flsenate.gov/Laws/Constitution#A5S10](http://www.flsenate.gov/Laws/Constitution#A5S10); FLA. STAT. §43.291 (2011), at [www.flsenate.gov/Laws/Statutes/2011/43.291](http://www.flsenate.gov/Laws/Statutes/2011/43.291).

427 FLORIDA CONSTITUTION art. 5, §8.

428 COLORADO CONSTITUTION, at <https://law.justia.com/constitution/colorado/cnart6.html>.

429 COLORADO CONSTITUTION art. 6, §23.

430 The commission was established pursuant to executive order. See the website of the governor of Delaware, at <https://tinyurl.com/y5mszpr8>.

431 DELAWARE CONSTITUTION art. 4, §3, at <https://tinyurl.com/y5dldg6r>.

the present nature of American politics, this requirement means that the justices must belong to one of the major parties: the Republican Party or the Democratic party.<sup>432</sup> The justice serves for a 12-year term, at the end of which, he or she must be reappointed following the same procedure. There is no mandatory retirement age for justices in the state.

36. **Hawaii** — There are five justices on the Supreme Court, who are selected by the governor upon the approval of the Senate (by an ordinary majority). The governor selects the justice from a list of four to six candidates put together by a nominating commission that comprises nine members: two appointed by the governor, two appointed by the speaker of the state's House of Representatives, two appointed by the state Senate president, one appointed by the chief justice of the state Supreme Court, and two appointed by the bar association. There may be no more than four attorneys among the commission's membership. The justice serves for a 10-year term, after which, he or she must obtain the commission's approval in order to continue to an additional term.<sup>433</sup> The retirement age for justices is 70.<sup>434</sup>
37. **Vermont** — There are five justices on the Supreme Court, who are selected by the governor upon the approval of the Senate (by an ordinary majority). The governor selects the justice from a candidate list that a professional commission compiles. The commission comprises 11 members: three attorneys licensed to practice before the Supreme Court who are selected by the bar association; two members who are not attorneys and who are appointed by the governor; three senators who are appointed by the state Senate (among whom there is no more than one attorney); and three congresspeople who are appointed by the House of Representatives (among whom there is no more than one attorney).<sup>435</sup> The justice serves for a six-year term, after which he or she must stand for **retention** before the General Assembly (the two congressional houses jointly), which may deny an additional term by an ordinary majority. The retirement age for judges is 90.<sup>436</sup>
38. **Massachusetts** — There are seven justices on the Supreme Court, who are selected by the governor with the approval of the executive branch (the "Executive Council"). We note that the Executive Council itself comprises eight representatives who are elected by the public through **direct elections** at the county level (based on a dedicated division of the state into five voting districts).<sup>437</sup> The governor selects the justice from a list of three to six candidates put together by a professional commission that comprises 21 members who are all appointed by the governor.<sup>438</sup> Judicial appointees may serve until the mandatory retirement age of 70.<sup>439</sup>
39. **New Hampshire** — There are five justices on the Supreme Court, who are selected by the governor with the approval of the executive branch (the "Executive Council"). It should be noted that the Executive Council itself comprises five representatives who are elected by the public through **direct elections** at the county level (based on a division of the state

432 See the description on the website at [www.statecourtsguide.com/guide/delaware](http://www.statecourtsguide.com/guide/delaware).

433 HAWAII CONSTITUTION art. 6, §§3,4, at <https://lrb.hawaii.gov/constitution>.

434 *Id.*

435 VERMONT CONSTITUTION ch. 2, §§29,32,34, at [www.usconstitution.net/vtconst.html#Section29](http://www.usconstitution.net/vtconst.html#Section29); VT. STAT. ANN., tit. 4, §§ 4, 5, 601, 603, at <https://legislature.vermont.gov/statutes/title/04>.

436 VT. STAT. ANN., tit. 4, §609.

437 We must not confuse between the division of the state into the counties that elect councilors to the Executive Council and the distribution into voting districts for national elections. The two do not necessarily overlap.

438 MASSACHUSETTS CONSTITUTION ch. 2, §1, art. 9, at <https://tinyurl.com/y2dqqlqs>; MASSACHUSETTS CONSTITUTION ch. 3, art. 1, at <https://tinyurl.com/y6f8q9fg>; GOVERNOR OF MASSACHUSETTS EXECUTIVE ORDER No. 500, available at: <https://tinyurl.com/yyah7m48>.

439 MASSACHUSETTS CONSTITUTION ch. 3, §1.

into five voting districts).<sup>440</sup> The governor selects the justice from a list of candidates put together by a committee that comprises 9 to 11 members who are all appointed by the governor. The committee must include representation for each of the Executive Council's voting districts.<sup>441</sup> The appointment to the bench is until retirement at the age of 70.<sup>442</sup>

- 40. New York** — There are seven judges on the Court of Appeals — the highest court in the state — who are selected by the governor with the approval of the Senate (by an ordinary majority). The governor selects the judge from a list of three to seven candidates who are nominated by a commission that comprises 12 members: Four are appointed by the governor (including two jurists and two non-jurist citizens; there is a ban on more than two of the appointees belonging to the same party), four are appointed by the chief judge of the Court of Appeals (including two jurists and two non-jurist citizens; there is a ban on more than two of the appointees belonging to the same party), one member is appointed by the president of the New York State Senate, one member is appointed by the Senate minority Leader, one member is appointed by the chair of the House of Representatives, and an additional member is appointed by the minority leader in the House of Representatives. The judge serves for a term of 14 years, after which he or she must undergo the above appointment process again. The retirement age for judges is 70.<sup>443</sup>
- 41. Connecticut** — There are seven justices on the Connecticut Supreme Court, who are selected by the governor with the approval of the General Assembly (both legislative houses) by an ordinary majority. The governor selects the justice from a list of candidates compiled by a professional commission that comprises 12 members: three attorneys and three non-jurist citizens who are appointed by the governor; two attorneys and two non-jurist citizens who are appointed by representatives of the majority in the General Assembly (meaning, the majority leader of the Senate and the majority leader of the House of Representatives); and an individual attorney and an individual non-jurist citizen who are appointed by the minority leader in the House of Representatives. No more than six members belonging to the same political party may serve on the commission. A justice serves for an eight-year term, at the end of which he or she must be reapproved by the commission prior to being appointed by the governor to an additional term.<sup>444</sup> The retirement age for justices is 70.<sup>445</sup>
- 42. Rhode Island** — There are five justices on the Supreme Court, who are selected by the governor with the approval of each of the legislative houses by an ordinary majority. The governor selects the justice from a list of three to five candidates compiled by a professional commission that comprises nine members, all of whom are officially appointed by the governor. The governor selects four of the members of the commission (of which three are attorneys and one is not a jurist), and the rest are appointed by the governor from five different lists compiled by representatives of the majority and minority of both legislative houses (The majority and minority leaders of both the House of Representatives and the Senate each compile one list, whereas the fifth list is composed jointly by representatives of the majority in the Senate and the House of Representatives, who are not necessarily all from the same party).<sup>446</sup> The appointment is for life, as there is no mandatory retirement age for justices in the state.

440 We must not confuse between the division of state into the districts that elect councilors to the Executive Council — currently five in number — and the distribution into voting districts for national elections — currently 12 in number. The two do not necessarily overlap.

441 NEW HAMPSHIRE CONSTITUTION art. 46, 73, at [www.nh.gov/glance/constitution.htm](http://www.nh.gov/glance/constitution.htm); GOVERNOR OF NEW HAMPSHIRE EXECUTIVE ORDER 2013-06, at <https://tinyurl.com/yyt95wk9>.

442 NEW HAMPSHIRE CONSTITUTION art. 78.

443 NEW YORK CONSTITUTION, art. 6, §25 at <https://tinyurl.com/yxz5q3uj>.

444 CONNECTICUT CONSTITUTION art. 25, at <https://tinyurl.com/yxawjdtc>; CONN. GEN. STAT. §51-44a, at <https://tinyurl.com/y3yaferf>; CONN. CODE tit. 2, ch. 16, §2-40 (2011), at <https://tinyurl.com/y4vk57w2>; CONN. CODE tit. 2, ch. 16, §2-42 (2011), at <https://tinyurl.com/y5bp9ntv>.

445 CONNECTICUT CONSTITUTION art. 5, §6.

446 RHODE ISLAND CONSTITUTION art. 10, §4.5, at [www.rilin.state.ri.us/riconstitution/Pages/C10.aspx](http://www.rilin.state.ri.us/riconstitution/Pages/C10.aspx); R.I. Gen. Laws §8.16.1, at <https://tinyurl.com/y40xurxg>.

## 4. Selection by Elected Public Officials With the Involvement of a Professional Commission (the Majority of Whose Members Are Not Appointed by Elected Public Officials) That Is Then Ratified by Elections

*The judicial selection process in practice in the following states originally formulated in the State of Missouri (and is therefore referred to as the "Missouri Plan"). The method comprises three components: First, a short list of candidates is compiled by a professional commission headed by a jurist — for the most part, the chief justice or an associate justice of the supreme court (half of the remaining members of the committee are appointed by the governor and half by the bar association); second, the governor of the state selects the candidate who will be appointed from that short list; finally, after a set period of time, the appointment is put up for a direct retention vote by the state's electorate. This method has spread throughout the United States and has taken on various forms. Although there are those who include among the "Missouri Plan" states any state that has adopted a judicial selection method that involves a professional commission, we believe that it is more accurate to differentiate between those states that have developed new variations of the method (that were set forth in the previous category) and those states that adopted the original method (presented below).*

43. **Iowa** — On the Supreme Court sit seven justices, who are selected by the governor. The governor selects the justice from a list of three candidates that is compiled by a professional commission that comprises 17 members: Eight are selected by the bar association; eight are appointed by the governor with the approval of the state Senate (by an ordinary majority); as well as a justice of the state's Supreme Court who serves as the chair. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of one year as of the date on which he or she was appointed and afterward, for recurring retention elections every eight years.<sup>447</sup> The retirement age for justices is 72.<sup>448</sup>
44. **Indiana** — There are five justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three candidates compiled by a professional commission that comprises seven members: three citizens who are not jurists who are appointed by the governor; three attorneys selected by the bar association; and the chief justice of the state's Supreme Court who serves as the chair. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of two years of the date on which he or she was appointed and afterward, for recurring retention elections every 10 years. The retirement age for justices is 75.<sup>449</sup>
45. **Alaska** — There are five justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of at least two candidates that is compiled by a professional commission that comprises seven members: three citizens who are not jurists who are appointed by the governor with the approval of both houses of the legislature by a joint resolution (by an ordinary majority); three attorneys selected by the bar association; and the chief justice of the Supreme Court who serves as the chair. The appointed justice must **face direct retention elections** by the residents of the state in the framework

447 IOWA CONSTITUTION art. 5, §§15, 17 at <https://tinyurl.com/y3tnhvdI>; IOWA CODE §§ 46.1, 46.2, at <https://tinyurl.com/y2ptm4nx>; IOWA CODE §602.4101, at <https://tinyurl.com/y3qods5p9>.

448 IOWA CODE §602.1610, at [www.legis.iowa.gov/docs/code/2019/602.1610.pdf](http://www.legis.iowa.gov/docs/code/2019/602.1610.pdf).

449 INDIANA CONSTITUTION art. 7, §§9,11, at <https://tinyurl.com/y2g7ehsh>; IND. CODE §33-38-13-8, at <https://tinyurl.com/y66wr6uu>.

of the state's first general election starting at the end of three years of when he or she was appointed and afterward, for recurring retention elections every 10 years.<sup>450</sup> The retirement age for justices is 70.<sup>451</sup>

46. **South Dakota** — There are five justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of two candidates compiled by a professional commission that comprises seven members: three attorneys appointed by the president of the bar association; two citizens who are not attorneys and are appointed by the governor; and two District Court judges who are selected by the "judicial conference" (an administrative body, all of whose members are sitting judges). The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of three years of the date on which he or she was appointed and afterward, for recurring retention elections every eight years.<sup>452</sup> The retirement age for justices is 70.<sup>453</sup>
47. **Wyoming** — There are five justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three candidates that is compiled by a professional commission that comprises seven members: three citizens who are not attorneys who are selected by the governor; three attorneys selected by the bar association; and the chief justice of the Supreme Court (or his or her representative) who serves as the chair. The appointed justice **stands for direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of two years from the date on which he or she was appointed and afterward, for recurring direct retention elections every eight years.<sup>454</sup> The retirement age for justices is 70.<sup>455</sup>
48. **Missouri** — The birthplace of the "Missouri Plan," which other states have adopted. There are seven justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three candidates that is compiled by a professional commission that comprises seven members: three citizens who are not jurists who are appointed by the governor; three attorneys selected by the bar association; and the chief justice of the Supreme Court who serves as the chair. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of one year from when he or she was appointed and afterward, for repeat retention elections every 12 years.<sup>456</sup> The retirement age for justices is 70.<sup>457</sup>
49. **California** — The only one of the states included in this category that adopted a multistage method that is not based on the "Missouri Plan" (although it is definitely similar). There are seven justices on the state's Supreme Court, who are selected by the governor. The governor sends the name of the nominated candidate to be examined by the Commission on Judicial Nominees Evaluation of the State Bar of California, which composes a nonbinding opinion on the candidate and the measure of the candidate's suitability to the position.<sup>458</sup> Afterward, the candidate must obtain the approval of the Commission on Judicial Appointments that comprises three members: The chief

450 ALASKA CONSTITUTION art. 4, §§ 5-6, 8 at <https://tinyurl.com/y5a4qemk>.

451 ALASKA CONSTITUTION art. 4, §11.

452 SOUTH DAKOTA CONSTITUTION art. 5, §§7,9, at <https://tinyurl.com/y6c2cfl5>; S.D. CODIFIED LAWS §16-1A-2, at <https://tinyurl.com/y33vd4jx>.

453 S.D. CODIFIED LAWS §16-1-4.1, at <https://tinyurl.com/yxjecphz>.

454 WYOMING CONSTITUTION art. 5, §4, at <https://tinyurl.com/yxvudqfm>; WYO. STAT. ANN., tit. 5 (2017), at <https://tinyurl.com/ybwdt2d>.

455 WYOMING CONSTITUTION art. 5, §5.

456 MISSOURI CONSTITUTION art. 5, §§19,25, at [www.moga.mo.gov/mostatutes/ConstArticles/Art05.html](http://www.moga.mo.gov/mostatutes/ConstArticles/Art05.html).

457 MISSOURI CONSTITUTION art. 5, §26.

458 CAL. GOV. CODE §12011.5, at <https://law.onecle.com/california/government/12011.5.html>.

justice of the state's Supreme Court, the state attorney general, and the most senior presiding justice on any Court of Appeal. This commission also holds public hearings for the candidates. The appointed justice must **face direct retention elections** by residents of the state **in the framework of the first gubernatorial elections** following the date of appointment (such elections are held once every four years) and afterward, for direct recurring retention elections every 12 years.<sup>459</sup> There is no mandatory retirement age for judges in the state.

50. **Kansas**— There are seven justices on the Supreme Court, who are selected by the governor. The governor selects the justice from a list of three candidates that is compiled by a professional commission that comprises nine members: an attorney who serves as chair who is elected by all of the attorneys in the state; four attorneys who are selected by the bar association; and four citizens who are not jurists who are appointed by the governor. The appointed justice must **face direct retention elections** by the residents of the state in the framework of the state's first general election starting at the end of one year of the date on which he or she was appointed and afterward, for recurring direct retention elections every six years.<sup>460</sup> The retirement age for justices is 75.<sup>461</sup>

459 CALIFORNIA CONSTITUTION art. 6, §16, at [www.courts.ca.gov/documents/article\\_vi\\_current.pdf](http://www.courts.ca.gov/documents/article_vi_current.pdf). An example of the working rules of the Commission on Judicial Appointments may be found on the California court administration's website at [www.courts.ca.gov/documents/guidelinescja.pdf](http://www.courts.ca.gov/documents/guidelinescja.pdf). For more on the subject, see THE SUPREME COURT OF CALIFORNIA (7th ed. 2016), at <https://tinyurl.com/y5r5h595>.

460 KANSAS CONSTITUTION art. 3, § 5 at <https://kslib.info/829/Article-3-Judicial>; KAN. STAT. ANN. §20-119, at <https://tinyurl.com/yxst9cbg>.

461 KAN. STAT. ANN. §20-2608, at <https://tinyurl.com/y62lql4p>.



## Summary

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In this study, we have sought to examine the judicial processes for the high constitutional courts in a line of prominent democracies. Our research focused on three groups: OECD member states, the 30 leading countries in the "The Economist" Group's 2018 Democracy Index, and the 50 states that comprise the United States.

Of the 37 OECD member states, 31 countries grant control over the selection of the members of the highest constitutional court to elected public officials. Of those: In 10 countries, members of the court are selected in collaboration between the executive and the legislative branches; in six countries, the legislative branch alone selects its members; in 10 countries, they are selected solely by the executive branch; and in five additional countries, a split model is used where elected public officials control the identity of most of the serving judges but not all of them. Thus, for example, in the United States, the president of the United States selects the justices of the Supreme Court with the approval of the Senate. In France, members of the Constitutional Council are selected by the president and both chambers of parliament. In Australia, the attorney general selects the members of the Supreme Court. In Japan, they are selected by the Japanese government with the approval of the entire country through a public referendum. Diverging slightly from the above pattern, in Italy, elected public officials are responsible for selecting 10 out of the 15 members of the Constitutional Court (while the rest are selected by the legal system).

Only Israel and five other countries place the power to determine the identity of all or most of the members of the constitutional court in the hands of entities who are not elected public officials. The other five countries are the United Kingdom, Luxembourg, Turkey, Greece, and Colombia. However, of the above five, in the United Kingdom and Luxembourg, the court does not have the power to overturn legislation and therefore, the public — through its elected representatives — continues to control the determination of policy.

In our opinion, in terms of ideological constitutional adjudication, constitutional courts are similar in their characteristics to supreme courts. With that, even if we limit the comparison of the judicial selection methodologies employed to supreme courts alone, we find that among the 17 members of the OECD in which the highest constitutional court is the Supreme Court (and not a constitutional court), only in the United Kingdom and in Israel is the selection of justices (or at least, most of them) not entrusted exclusively to elected public officials. As noted above, the Supreme Court of the United Kingdom, which does not have the power to overturn legislation, is not comparable to the Supreme Court of Israel, which does. Thus, among the members of the OECD, Israel stands alone.

A breakdown of the 30 leading countries in the 2018 Democracy Index yields similar results: In 25 of the countries that are ranked, elected public officials are the ones who select all or most of the members of the highest constitutional court. Of those: in 11 countries, the judges are selected by the executive branch; in six countries, they are selected by the legislative branch; in four countries, the selection is made in collaboration between the executive and legislative branches; and in four countries, a split model is applied where elected public officials decide the identity of most of the court's members. Even from among this group of countries, only four countries — besides Israel — do not give the authority to select the judges to elected public officials: Luxembourg and the United Kingdom (where, as we have noted, the court does not have the power to overturn legislation), as well as Mauritius and Botswana.

An examination of the states that comprise the United States indicates an even clearer tendency than above, as in **all** of them, the process of selecting the members of the highest constitutional court is given to elected public officials in one way or another. Direct elections at the ballot box is the most common method among those states and is the practice in 22 of them. In four states, elected public officials are the ones who select the judges, without the involvement of a professional commission. In 24 states, a professional commission is involved in the appointment process and submits a short list of candidates to elected public officials who select from it the candidate to be appointed. Moreover, in 16 of those states, the elected public officials determine the identity of the majority of the commission members. In addition, out of those 16 states, in one, the appointment undergoes a retention process before the legislative houses at the end of each term, and in eight, direct retention elections by the public at large are held usually up to two years from the date of appointment. Finally, in eight states, the state governor selects the judges with the involvement of a professional committee (the majority of whose members are **not** appointed by elected public officials). However, in all of those states, the judges stand for direct, general retention elections by the public at large usually very close to the date of appointment as well as for recurring retention elections at the end of each term (usually, every 6 to 12 years). That is to say, **in all of the individual states of the United States, the process of selecting judges to the highest constitutional court is placed in the hands of the public**, whether by direct elections or by means of its democratically elected representatives, either in an election procedure or through a process of ratification thereof (retention). Even in states in which there is binding involvement of professional entities, the judges face general retention elections close to the date of their appointment in order to ensure democratic legitimization of their service. In total, the public is involved in directly selecting judges in 38 of the states through a democratic election at the ballot box, and in the rest, the public influences the selection process through its representatives.

The findings of our research demonstrate that the lion's share of the democracies that we have examined places the power to select the judges to the highest constitutional court in the hands of elected public officials. In the individual states of the United States, this arrangement is even more obvious: In 22 of the individual states, the public directly determines the identity of the court's members, whereas in all of the remaining states, it does so through its elected representatives. These findings bring Israel's uniqueness against the panorama of worldwide judicial selection methods into starker relief.

In the first part of this study that briefly addressed the normative background for the comparative research that we conducted, we presented three central arguments posited by those opposed to a judicial selection method that relies on the public or its representatives. They assert that despite the democratic deficit that afflicts an apolitical selection process, it is nevertheless appropriate to involve jurists who are not elected public officials in selecting the judges of the highest constitutional court in order to avoid damaging the court's independence, its professional level, and the public's faith in it. Given the findings of this comparative study, the question arises — from among all of the countries described above, do the courts in Israel, Greece, or Turkey enjoy the highest degree of public faith? Is it indeed the case that only in this prestigious club of countries, the courts are both professional and independent? We leave it to the reader to consider this question and decide.





# Appendix

## The OECD's Member States

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
<b>The United States</b>	Supreme	Yes	President of the country (head of the executive branch), with the approval of the Senate	Yes	No
<b>Germany</b>	Constitution	Yes	By both legislative bodies, by an absolute and special majority: Eight representatives from the Bundestag and eight from the Bundesrat	Yes	No
<b>France</b>	Constitution	Yes	Three by the president of the Republic (head of the executive branch), three by the president of the senate, and three by the president of the National Assembly; all with parliamentary approval <sup>462</sup>	Yes	No
<b>Canada</b>	Supreme	Yes; <b>override clause</b>	The prime minister (head of the executive branch), based on the nonbinding advice of the Queen's Privy Council for Canada	Yes	A customary nonbinding recommendation
<b>Australia</b>	Supreme	Yes	The prime minister (head of the executive branch), at the recommendation of the minister of justice	Yes	A customary nonbinding recommendation

462 In each of the houses of parliament, appointments will be confirmed before a parliamentary committee acting thereunder and — in relation to the selection of the president of the Constitutional Council — before both committees jointly. An appointment will be rejected if the total votes against the appointment in the relevant committee (and in the case of the president of the Constitutional Council, in both committees jointly) stands at 60% of the total votes cast.

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
<b>New Zealand</b>	Supreme	No	Minister of justice	Yes	A customary nonbinding recommendation
<b>Japan</b>	Supreme	Yes	Executive branch (with periodic approval by public referendum)	Yes	No (other than a customary nonbinding recommendation for the appointment of the chief justice)
<b>Belgium</b>	Constitution	Yes	The legislative branch, by a special majority, in collaboration with the executive branch	Yes	No
<b>Switzerland</b>	Supreme	No	The legislative branch	Yes	No
<b>Austria</b>	Constitution	Yes	Eleven by the executive branch and nine by the parliamentary chambers, by an ordinary majority	Yes	No
<b>Mexico</b>	Supreme	Yes	The president of the country (head of the executive branch), generally in collaboration with the Senate (by special majority)	Yes	No
<b>Czech Republic</b>	Constitution	Yes	The president of the country (who is not the head of the executive branch but is elected through general elections) with approval of the senate, by an ordinary majority	Yes	No
<b>Hungary</b>	Constitution	Yes	The legislative branch, by an absolute and special majority	Yes	No
<b>Slovakia</b>	Constitution	Yes	The legislature, by an ordinary majority, in collaboration with the president of the country (who is not the head of the executive branch but is elected through general elections)	Yes	No
<b>Slovenia</b>	Constitution	Yes	The president of the country (who is not the head of the executive branch but is elected through general elections) in collaboration with the legislature (by an absolute majority)	Yes	No

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
<b>Poland</b> <sup>463</sup>	Constitution	Yes	The legislative branch, by an absolute majority	Yes	No
<b>Estonia</b>	Supreme	Yes	The chief justice of the Supreme Court of Estonia is selected by the legislature by an ordinary majority, according to the nomination that the country's president (who is not the head of the executive branch) provides. The legislature selects the remaining justices of the Supreme Court by an ordinary majority	Yes	Chief justice of the Supreme Court — no; The remaining Supreme Court justices — a statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials
<b>Ireland</b> <sup>464</sup>	Supreme	Yes	The executive branch	Yes	For candidates who are sitting judges — none; For candidates who are not sitting judges — statutory nonbinding recommendation
<b>The Netherlands</b>	Supreme	<b>No</b>	The minister of justice upon the recommendation of the legislative branch, which is formulated by an ordinary majority	Yes	A nonbinding statutory recommendation
<b>Denmark</b>	Supreme	Yes	The minister of justice based on a nonbinding committee recommendation	Yes	A nonbinding statutory recommendation
<b>Sweden</b>	Supreme	Yes	The executive branch based on a nonbinding committee recommendation	Yes	A nonbinding statutory recommendation

463 The country is in the middle of a significant constitutional crisis, and therefore, what we have written here is subject to imminent change.

464 This is subject to imminent change due to a pending legislative initiative.

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Norway	Supreme	Yes	The executive branch based on the nonbinding recommendations of a committee and the chief justice of the Supreme Court	Yes	A statutory nonbinding recommendation by jurists who were themselves appointed by elected public officials
Finland	Supreme	No; <b>override clause</b>	The country's president (a member of the executive branch) based on a nonbinding recommendation by the Court	Yes	A nonbinding statutory recommendation
Iceland	Supreme	Yes	The minister of justice, upon the recommendation of a committee (with a certain license to deviate)	Yes	A binding statutory recommendation with a political override mechanism
Latvia	Constitution	Yes	Three by the legislative branch by an ordinary majority, two by the executive branch, and two by the Supreme Court; <b>all with the approval of the legislative branch</b> by an absolute majority	Five judges — yes Two judges — no	Five judges — A nonbinding statutory recommendation Two judges — binding involvement
Lithuania	Constitution	Yes	Three by the chair of the Seimas (parliament), three by the country's president (who is not the head of the executive branch but is elected in a general election), and three by the president of the Supreme Court; <b>all with the approval of the legislative branch</b> by an ordinary majority	Six judges — yes Three judges — no	Six judges — no Three judges — with binding involvement by jurists who were themselves appointed by elected public officials
Italy	Constitution	Yes	Five by the country's president (who is not the head of the executive branch and is elected by parliament), five by the legislative branch by a special majority, and five by the judicial branch	Ten judges — yes Five judges — no	Ten judges — no Five judges — binding involvement

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Spain	Constitution	Yes	Eight by the legislative branch by an absolute and special majority, two by the executive branch, and two by the judicial branch	Ten judges — yes Two judges — no	Ten judges — no Two judges — with binding involvement by jurists who were themselves appointed by elected public officials
Portugal	Constitution	Yes	Ten by the legislative branch by an absolute and special majority and three by the members of the Constitutional Court themselves	Ten judges — yes Three judges — no	Ten judges — no Three judges — with binding involvement by jurists who were themselves appointed by elected public officials
South Korea	Constitution	Yes	Three by the country's president (the head of the executive branch), three by the legislative branch by an ordinary majority, and three by the chief justice of the Supreme Court (who is himself or herself selected by elected public officials)	Six judges — yes Three judges — no	Six judges — no Three judges — with binding involvement by jurists who were themselves appointed by elected public officials
Chile	Constitution	Yes	Three by the country's president (head of the executive branch), three by the Supreme Court, and four by the two legislative houses by an absolute and special majority	Seven judges — yes Three judges — no	Seven judges — no Three judges — binding involvement
United Kingdom	Supreme	No	A professional commission in collaboration with the secretary of state for justice who has the right to refuse and has limited influence	No	Binding involvement
Luxembourg	Constitution	No	Five by a professional commission, with the approval and collaboration of the executive branch, and four based on their statutory positions	No	Binding involvement

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Turkey <sup>465</sup>	Constitution	Yes	The president of the country (head of the executive branch) and the legislative branch (by an absolute/ordinary/absolute and special majority — corresponding to the voting round in parliament), from a list of candidates formulated primarily by various legal entities	Four judges — yes Eleven judges — no	Seven judges — no Eight judges — binding involvement
Greece	Constitution	Yes	Statutory positions	No	Binding involvement
Israel	Supreme	Yes	A commission where the justices' consent is required for the candidate's selection	No	Binding involvement

465 After a failed attempted coup in 2016, the country's leader embarked on a purging campaign, inter alia, among the judiciary. Because these processes are still currently ongoing, it is very difficult to properly assess the power balances between the country's governmental branches.

## The 30 Leading Countries in The Economist's 2018 Democracy Index (In Order of Ranking)

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Norway (1)	Supreme	Yes	The executive branch based on the nonbinding recommendations of a committee and the chief justice of the Supreme Court	Yes	A statutory nonbinding recommendation by jurists who were themselves appointed by elected public officials
Iceland (2)	Supreme	Yes	The minister of justice, upon the recommendation of a committee (with a certain license to deviate)	Yes	A binding statutory recommendation with a political override mechanism
Sweden (3)	Supreme	Yes	The executive branch based on a nonbinding committee recommendation	Yes	A nonbinding statutory recommendation
New Zealand (4)	Supreme	<b>No</b>	Minister of justice	Yes	A customary nonbinding recommendation
Denmark (5)	Supreme	Yes	The minister of justice based on a nonbinding committee recommendation	Yes	A nonbinding statutory recommendation
Ireland (6-7) <sup>466</sup>	Supreme	Yes	The executive branch	Yes	For candidates who are sitting judges — none; For candidates who are not sitting judges — statutory nonbinding recommendation
Canada (6-7)	Supreme	Yes; <b>override clause</b>	The prime minister (head of the executive branch), based on the nonbinding advice of the Queen's Privy Council for Canada	Yes	A customary nonbinding recommendation

466 This is subject to imminent change due to a pending legislative initiative.

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Finland (8)	Supreme	No; <b>override clause</b>	The country's president (a member of the executive branch) based on a nonbinding recommendation by the Court	Yes	A nonbinding statutory recommendation
Australia (9)	Supreme	Yes	The prime minister (head of the executive branch), at the recommendation of the minister of justice	Yes	A customary nonbinding recommendation
Switzerland (10)	Supreme	<b>No</b>	The legislative branch	Yes	No
The Netherlands (11)	Supreme	<b>No</b>	The minister of justice upon the recommendation of the legislative branch, which is formulated by an ordinary majority	Yes	A nonbinding statutory recommendation
Luxembourg (12)	Constitution	<b>No</b>	Five by a professional commission, with the approval and collaboration of the executive branch, and four based on their statutory positions	No	Binding involvement
Germany (13)	Constitution	Yes	By both legislative bodies, by an absolute and special majority: Eight representatives from the Bundestag and eight from the Bundesrat	Yes	No
United Kingdom (14)	Supreme	<b>No</b>	A professional commission in collaboration with the secretary of state for justice who has the right to refuse and has limited influence	No	Binding involvement
Uruguay (15)	Supreme	<b>No</b>	The legislative branch, by an absolute and special majority	Yes	A customary nonbinding recommendation
Austria (16)	Constitution	Yes	Eleven by the executive branch and nine by the parliamentary chambers, by an ordinary majority	Yes	No



Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Mauritius (17)	Supreme	Yes	The chief justice of the Supreme Court — by the president of the country (who is not the head of the executive branch; is elected by the parliament); the senior puisne judge — by the chief justice of the Supreme Court; the remaining puisne judges — by the Judicial and Legal Services Commission	Chief justice of the Supreme Court — yes; Remaining judges — no	Chief justice of the Supreme Court — no; The remaining puisne judges — binding involvement by jurists who are themselves appointed by elected public officials
Malta (18)	Constitution	Yes	The prime minister (head of the executive branch)	Yes	The chief justice of the Constitutional Court — none; The remaining judges — a statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials
Spain (19)	Constitution	Yes	Eight by the legislative branch by an absolute and special majority, two by the executive branch, and two by the judicial branch	Ten judges — yes Two judges — no	Ten judges — no Two judges — with binding involvement by jurists who were themselves appointed by elected public officials
Costa Rica (20)	Constitution	Yes	The legislative branch, by an absolute and special majority	Yes	No

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
South Korea (21)	Constitution	Yes	Three by the country's president (the head of the executive branch), three by the legislative branch by an ordinary majority, and three by the chief justice of the Supreme Court (who is himself or herself selected by elected public officials)	Six judges — yes Three judges — no	Six judges — no Three judges — with binding involvement by jurists who were themselves appointed by elected public officials
Japan (22)	Supreme	Yes	Executive branch (with periodic approval by public referendum)	Yes	No (other than a customary nonbinding recommendation for the appointment of the chief justice)
Chile (23-24)	Constitution	Yes	Three by the country's president (head of the executive branch), three by the Supreme Court, and four by the two legislative houses by an absolute and special majority	Seven judges — yes Three judges — no	Seven judges — no Three judges — binding involvement
Estonia (23-24)	Supreme	Yes	The chief justice of the Supreme Court of Estonia is selected by the legislature by an ordinary majority, according to the nomination that the country's president (who is not the head of the executive branch) provides. The legislature selects the remaining justices of the Supreme Court by an ordinary majority	Yes	Chief justice of the Supreme Court — no; The remaining Supreme Court justices — a statutory nonbinding recommendation by jurists who are themselves appointed by elected public officials
The United States (25)	Supreme	Yes	President of the country (head of the executive branch), with the approval of the Senate	Yes	No

Country	Type of Court	Can Overturn Statutes	Method of Selection	Do Elected Public Officials Decide Alone	Involvement by Jurists
Cape Verde (26)	Constitution	Yes; <b>partial override clause</b>	The legislative branch, by an absolute and special majority	Yes	No
Portugal (27)	Constitution	Yes	Ten by the legislative branch by an absolute and special majority and three by the members of the Constitutional Court themselves	Ten judges — yes Three judges — no	Ten judges — no Three judges — with binding involvement by jurists who are themselves appointed by elected public officials
Botswana (28)	Supreme	Yes	The judge president of the Court of Appeal — by the president of the country (head of the executive branch); the remaining justices — by the Judicial Service Commission	Chief justice of the Supreme Court — yes; Remaining judges — no	Chief justice of the Supreme Court — no; The remaining puisne judges — binding involvement by jurists who are themselves appointed by elected public officials
France (29)	Constitution	Yes	Three by the president of the Republic (head of the executive branch), three by the president of the senate, and three by the president of the National Assembly; all with parliamentary approval <sup>467</sup>	Yes	No
Israel (30)	Supreme	Yes	A commission where the justices' consent is required for the candidate's selection	No	Binding involvement

467 In each of the houses of parliament, appointments will be confirmed before a parliamentary committee acting thereunder and — in relation to the selection of the president of the Constitutional Council — before both committees jointly. An appointment will be rejected if the total votes against the appointment in the relevant committee (and in the case of the president of the Constitutional Council, in both committees jointly) stands at 60% of the total votes cast.

## The 50 Individual States of the United States (According to Selection Process)

Direct Democratic Elections		By Elected Public Officials	By Professional Commission Whose Members Are Appointed by Elected Public Officials		The “Missouri Plan”
1. Ohio	12. Texas	1. Virginia	1. Oklahoma*	12. New York	1. Iowa*
2. Oregon	13. Louisiana	2. Maine	2. Arizona*	13. Florida*	2. Indiana*
3. Idaho	14. Montana	3. New Jersey	3. Delaware	14. Colorado*	3. Alaska*
4. Illinois*	15. Minnesota	4. South Carolina	4. Hawaii	15. Connecticut	4. South Dakota
5. Alabama	16. Mississippi		5. Vermont	16. Rhode Island	5. Wyoming*
6. Arkansas	17. Michigan		6. Tennessee*		6. Missouri*
7. Georgia	18. Nevada		7. Utah*		7. California*
8. North Dakota	19. New Mexico*		8. Massachusetts		8. Kansas*
9. Washington	20. Pennsylvania*		9. Maryland*		
10. Wisconsin	21. Kentucky		10. Nebraska*		
11. West Virginia	22. North Carolina		11. New Hampshire		

\*The state also holds democratic retention elections.

## The 50 Individual States of the United States (According to the Stage at Which the Public is Involved in the Selection Process)

In all of the individual states of the United States, the process of selecting judges to the highest constitutional courts is placed in the hands of the public, whether by direct elections or by means of its democratically-elected representatives, either in an election procedure itself or through a process of ratification thereof (retention):

Selection by the Public Ab Initio		Retention Elections		Selection by Elected Public Officials
1. Ohio	13. Louisiana	1. Oklahoma	13. Florida	1. Delaware
2. Oregon	14. Montana	2. Iowa	14. Colorado	2. Hawaii
3. Idaho	15. Minnesota	3. Indiana	15. California	3. Virginia
4. Illinois**	16. Mississippi	4. Alaska	16. Kansas	4. Vermont
5. Alabama	17. Michigan	5. Arizona		5. Maine
6. Arkansas	18. Nevada	6. South Dakota		6. Massachusetts
7. Georgia	19. New Mexico**	7. Wyoming		7. New Jersey
8. North Dakota	20. Pennsylvania**	8. Tennessee		8. New Hampshire
9. Washington	21. Kentucky	9. Utah		9. New York
10. Wisconsin	22. North Carolina	10. Missouri		10. Connecticut
11. West Virginia		11. Maryland		11. South Carolina
12. Texas		12. Nebraska		12. Rhode Island

\*\*In addition to the direct elections that are held to fill a vacancy, retention elections by the public are also held later on.

## US States That Hold Retention Elections (By Date)

Unless otherwise indicated, public retention elections are held as part of the first general election that is held in that state immediately following the date stipulated below (General elections are held biannually):

Immediate	After One Year	After Two Years	After Three Years
Oklahoma <sup>468</sup>	Maryland <sup>469</sup>	Arizona	Utah
Tennessee	Florida	Colorado	Nebraska
California <sup>470</sup>	Iowa	Indiana	Alaska
	Wyoming		South Dakota
	Missouri		
	Kansas		

\*\*\*In addition to the above, in three states in which judges are selected through direct democratic elections, the judge must step down from the bench unless re-elected by the public through retention elections at the end of his or her term. This is the case in New Mexico (at the end of eight-year terms) as well as in Pennsylvania and Illinois (at the end of 10-year terms).

468 If elections are set for a date prior to the passing of one year from the date of the judicial appointment, retention elections are postponed by two years.

469 In contrast to other states where timetables are calculated as of the date of the judge's appointment, in Maryland, the one-year period is calculated **as of the date that the vacancy occurred.**

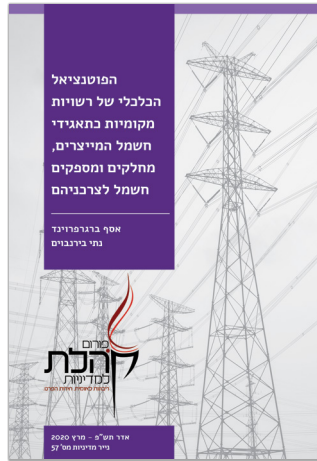
470 Retention elections are held during gubernatorial elections, which are held once every four years.



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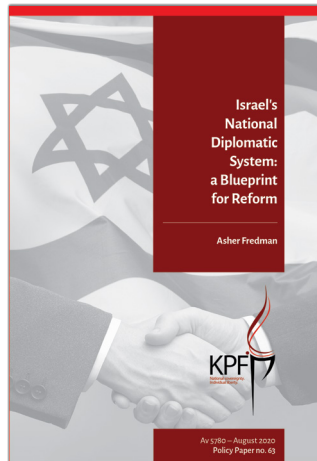


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