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Constitutional Law around the globe: selection of justices for the Supreme Court of Canada

Direito constitutional ao redor do globo: a seleção de juízes para a Suprema Corte Canadense

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Abstract: This paper exploring the Selection of Supreme Court Justices in Canada is part of the series "Constitutional Law Around the Globe". This topic of the series focuses on the "selection of justices in Supreme and Constitutional Courts" in contemporary democracies. First in the row, this paper analyzes the selection of Supreme Court Justices in Canadian Constitutional Law and how transparent and accountable is the process. A final paper will approach the legal systems composing the series in a comparative perspective.

Resumo: Este artigo, analisando a Seleção de Juízes para a Suprema Corte Canadense, faz parte da série "Direito Constitucional ao Redor do Globo". Este tópico da série tem por foco "a seleção de juízes para Cortes Supremas e Tribunais Constitucionais" em democracias contemporâneas. Primeiro sobre o tópico, este artigo analisa a seleção de juízes para a Suprema Corte Canadense e o quão transparente e plural é o processo. Um artigo final abordará os sistemas jurídicos componentes do tópico em uma perspectiva comparada.

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Introduction

This paper exploring the selection of justices in a comparative perspective is part of a series named "Constitutional Law Around the Globe".[1] This chapter of the series focuses on Supreme and Constitutional Courts and how they are shaped in many contemporary democracies.

First in the row, this paper focuses on the selection of justices to the Supreme Court of Canada. In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the selection of justices to the Supreme Court of Brazil in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such as in Canada, South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.[2]

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Equador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.[3]

1 The first one of the series is: ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the "writ of certiorari". *Revista de Investigações Constitucionais*, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020.

2 KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. *Consequential Courts. Judicial Roles in Global Perspective*. New York. Cambridge University Press, 2013.

3 COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. *Cultures of Legality. Judicialization and Political Activism in Latin America*. New York. Cambridge University Press, 2010.

Certainly, the notion of a Constitution comprises the interpretation and enforcement of rights. Therefore, a Constitution is not only a solemn declaration of rights. In fact, the content of a Constitution derives also from the actual interpretation and enforcement by a specific institution. In modern democracies, this role of interpreting and enforcing constitutional provisions are in many cases attributed to courts that end up shaping constitutional rights.[4] In parallel, the use of new interpretative constitutional methods has made possible the shape of meaning of constitutional norms, with no need to rewrite the text by means of constitutional amendments.[5] This is a reality in many jurisdictions, including Canada and Brazil.

In this broad picture, Supreme Courts (and also the lower courts and judges) have been playing a very important role in the democratic process. In several jurisdictions, this has lead to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, freedom of speech, equal clauses, among many others.

In spite of many reasons favouring its growing adoption in the world, judicial review has been suffering from a legitimacy crisis in many jurisdictions, including in Brazil. This phenomenon has been coined by Bickel the "countermajoritarian difficulty".[6] It focuses on non-elected judges striking down legislation passed by parliament in an unconstrained or little constrained way. The most powerful of the problems concerning judicial review is to reach a balance between judicial independence and responsibility.[7]

The processes under which democratic jurisdictions can shape the plurality, transparency, partisanship and accountability of Supreme Courts is thus of highest importance. That`s why we will be analyzing processes that different jurisdictions use to select their justices.

The *problem* under scrutiny in the series is how Constitutional and Supreme Courts are shaped in a set of democratic jurisdictions in a comparative perspective. The selection of justices plays a key role on the subject in many democracies. However, there are many variations among different jurisdictions that should be specifically assessed.

The *aim* of the chapter Supreme Courts of the Series Constitutional Law Around the Globe is to analyse how Supreme Courts are shaped in democracies in

4 ROUSSEAU, Dominique. *Droit du contentieux constitutionnel*. Paris. Montchrestien, 2010.
5 BONAVIDES, Paulo. *Curso de Direito Constitucional*. São Paulo. Malheiros, 2007.
6 BICKEL, Alexander. *The least dangerous branch. The Supreme Court at the Bar of Politics*. New York. The Bobbs-Merrill Company, Inc., 1962.
7 SHAPIRO, Martin. Judicial Independence: New Challenges in Established Nations. *Indiana Journal of Global Legal Studies*, Bloomington, n. 20, pp. 253-277, 2013.

a comparative perspective. The selection process of Supreme Court Justices is an important feature of it.

The *hypothesis* of the series is that the selection of justices vary widely among democracies. Understanding those differences and nuances allows the comprehension of processes that can enhance transparency and accountability in democracies around the world.

The *methodology* used is consultation of references (primary and secondary sources – books, papers and judicial decisions).

1 The Constitution Act (1982) and the Supreme Court of Canada

The law that created the country of Canada was called the British North America Act, 1867. It is normally refered to as "BNA Act". In 1982, it was renamed the Constitution Act, 1982. The BNA Act was passed by the British Parliament (Westminster) because Canada was a British Colony at the time. As Canada was founded in 1867, there was no Canadian citizenship and Britain was still in charge of foreign affairs. There was no mention of a Supreme Court of Canada. Appeals were headed to the Judicial Committee of the Privy Council in London.[8] This state of affairs (the post-colonial legal age) lasted until the late 1940's.

The post-colonial legal age ended in 1949 and was followed by a transitional moment, during which Canada progressively changed into a legal system that was genuinely Canadian. In 1960, Parliament enacted the Canadian Bill of Rights Act, an ordinary law that applied only to the federal government protecting freedom of speech, freedom of religion, and other rights.[9]

In the early 1980's, the Canadian constitutional reforms were sent to the British Parliament for passage as the Canada Act 1982. That was a necessary legal step as the Canadian Constitution had until then consisted of laws passed by the British Parliament. This final act was required ir order to legally liberate the Canadian Constitution from Great Britain. In April 17, 1982, the Constitution Act, 1982, came into effect and the BNA Act was officially renamed the Constitution Act, 1867. The first 34 sections of the Constitution Act, 1982, contain the Canadian Charter of Rights and Freedoms, simply known as The Charter.[10]

Since that year of 1982, legislatures and the executive branch should comply with the division of powers stated in the 1867 *BNA Act*, as well as to the *Charter* (1982) and other new guarantees. From that year on, citizens could challenge the

[8] DODEK, Adam. *The Canadian Constitution*. Toronto. Dundurn, 2016.
[9] DODEK, Adam. *The Canadian Constitution*. Toronto. Dundurn, 2016.
[10] DODEK, Adam. *The Canadian Constitution*. Toronto. Dundurn, 2016.

constitutionality of laws before courts and the role of the judicial branch was highly enhanced.

Truly, the proposal of entrenching fundamental rights into a constitution was strongly favoured by the Canadian public support for negotiations lead by then Prime Minister Pierre Trudeau, who considered the Charter the major legacy of his fifteen years in power. Nevertheless, the Charter faced harsh opposition from almost all the provincial government leaders, who spoke out in practical grounds theoretical criticisms developed by a number of serious constitutional scholars.[11]

Finally adopted the Charter, the legitimacy of judicial review came to the agenda in Canadian Constitutional Law. From the enactement of the Constitution Act, 1982, judicial review has necessarily involved judges in scrutinizing the substance of legislative and governmental initiatives for their compliance with the constitution semantically open text. Not surprisingly, the scope of judicial activity expanded and raised concerns about the exercise of judicial power interpreting and enforcing the Constitution.[12]

Canada judicial review is decentralised. As such, Canadian courts are normally entitled to judicial review of legislation and there is no separate Constitutional Court, rather a Supreme Court, an appex court on constitutional issues.[13]

The Supreme Court of Canada decides 70-85 constitutional issues each year and is an international reference among constitutional judicial bodies. According to the Supreme Court Act, the Court consists of a chief justice and eight puisne (ordinary) judges, all appointed by the Governor in Council, who represents the monarch.[14]

There is a commonsense claim that members of constitutional courts should be democratically legitimised. However, the legitimisation of justices is normally indirect, as direct legitimation in the selection of justices would nor necessarily mean a better quality and independence. Thus, the legitimacy is attained by a controlled and transparent selection process.[15] This was not always the case in Canada.

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[11] WEILER, Paul C. Rights and Judges in a Democracy: A New Canadian Version. *University of Michigan Journal of Law Reform*, Ann Arbor, vol. 18, issue 1, pp. 51-92, 1984.

[12] BAKAN, Joel. *Just words. Constitutional rights and social wrongs.* Toronto. Buffalo. London. University of Toronto Press, 2012.

[13] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[14] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[15] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

2 Judicial appointments for the Supreme Court of Canada. Historical aspects

The Supreme Court Act, Section 4.2, provides that the judges of the Supreme Court of Canada "shall be appointed by the Governor in Council by letters patent under the Great Seal." In Canadian practice, the expression "Governor in Council" has meant the federal cabinet giving the Governor-General advice that must be accepted. In practice, this federal cabinet has always been dominated by the Prime Minister.[16]

Formally, there were only two formal restraints on the discretion to appoint justices in Canada: (i) the appointee must have been a judge of a superior court, or a lawyer (a "barrister or advocate") of at least ten years standing in the bar of a province; (ii) three of the judges must be from the bar of the province of Quebec. According to the Supreme Court, this requirement has a dual purpose: (i) as Quebec, having inherited french Law, is a civil law system, the nomination of justices from Quebec would guarantee a civil law expertise in the Court; (ii) the nomination of justices from Quebec helps keep the Province's legal traditions and social values on the Court and therefore the confidence of Quebec's people in the Court.[17]

In this respect, the practice has forged a regional basis for nominations for justices: three of the justices come from the Ontario bar, one from the four Atlantic provinces and two from the four western provinces.[18] Over time, other regional features have showed themselves valuable, such as the appointment of the first judge from neither of the two so-called 'founding peoples' of Canada (English of Frech) and also the first female judge.[19]

In these pre-1970 times, a partisan political connection was often a significant and visible factor. Besides, prior judicial service was not particularly important.[20] In the 1970's, Canadian judicial system suffered a profound transformation, named by McCormick as the "Great Canadian Judicial Revolution" that continued incrementally

[16] McCORMICK, Peter. Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada. *The Journal of Appellate Practice and Process*, Little Rock, Volume 7, Issue 1, Article 2, p. 1-42, 2005.

[17] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[18] McCORMICK, Peter. Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada. *The Journal of Appellate Practice and Process*, Little Rock, Volume 7, Issue 1, Article 2, p. 1-42, 2005.

[19] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019. (p. 109)

[20] McCORMICK, Peter. Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada. *The Journal of Appellate Practice and Process*, Little Rock, Volume 7, Issue 1, Article 2, p. 1-42, 2005.

in the decades to come.[21] One of those changes were the improvements in the selection process of justices to the Supreme Court.

Until the year 2004, levels of transparency of the federal judicial appointments were very low and only some details were known to the large public. The most important ones are that the Minister of Justice consulted with the chief justice of the Supreme Court, other Supreme Court judges, provincial chief justices, attorneys general, Canadian Bar Association officials, and law society officials. Based on these consultations, the Minister of Justice would prepare a list of candidates from which the Prime Minister would pick a nominee.[22] It was said that "[m]ore was known about the process for electing a new Pope than about the process for selecting a new Supreme Court [of Canada] justice".[23]

In the year 2003, the newly elected prime minister recognized a 'democratic deficit' in the process, that, according to him, should suffer changes in order to be more transparent and more accountable. The new process, intoduced in 2006, required the parliamentary hearing of the candidates. This new process was not followed in all of the cases and in 2014 it was explicitly said that it would no longer be followed.[24]

In this period (2004-2014) there were reforms involving the creation of committees of members of parliament that had the power to veto names from a list of nominees provided by the Minister of Justice. This shorlist containing three names for each vacancy was then sent back to the Minister. The Prime Minister then chose a 'nominee' from this list. This nominee faced a convened hearing before a committee of parliamentarians who could ask questions but had no veto or recommendation power.[25]

There was much public debate on the advantages and disadvantages of public hearings for nominees. Opponents argued that they would menace judicial independence because appointees would have to defend their decisions and ideologies to the legislature. Besides, they contended that the process without hearings, in spite of lacking some desirable transparency, was non-partisan and that televised sessions would politicize it. A third argument was that candidates

[21] McCORMICK, Peter. Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada. *The Journal of Appellate Practice and Process*, Little Rock, Volume 7, Issue 1, Article 2, p. 1-42, 2005.

[22] ALARIE, Benjamin; GREEN, Andrew. Policy Preference Change and Appointments to the Supreme Court of Canada, *Osgoode Hall Law Journal*, Toronto, vol. 47, n. 1, p. 1-46, 2009.

[23] DEVIN, Richard; DODEK, Adam. The Achilles heel of the Canadian judiciary: the ethics of judicial appointments in Canada, *Legal Ethics*, v. 20, n. 1, p. 43-63, 2017.

[24] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[25] DEVIN, Richard; DODEK, Adam. The Achilles heel of the Canadian judiciary: the ethics of judicial appointments in Canada, *Legal Ethics*, v. 20, n. 1, p. 43-63, 2017.

could refuse appointments in order to protect themselves from public scrutiny on their personal lives.[26] There is also evidence that very few questions of substance, either in terms of policy or the candidates' previous judicial decisions, were posed at the hearings.[27]

On the other hand, sympathizers of the public hearings argued that they would grant a desired transparency to the process, with democratic gains.[28] They also claimed that the hearings would educate canadians about their legal and judicial system. As a third claim, they contended that the hearings could be regulated in order to prevent questions that could undermine the nominee`s integrity. However, both sides agreed that indeed there was a lack of transparency.[29]

In August 2016, the Government of Canada announced another new process that is 'transparent, inclusive, and accountable to Canadians' would be followed.[30] This new process, that inovated with the creation of a non-partisan Advisory Board, will be explored in next chapter.

3 The advisory board and the new selection process (2016)

It has been demonstrated that the judges of the Supreme Court of Canada are appointed by the executive power and that specially from 2004 to 2014 there were practical and statutorial reforms in the selection process in order to set limits to the executive branch almost unfettered discretion. These changes consisted specially in the participation of the Legislative Branch in the nomination process.

In 2016 there were new incremental changes to the selection process of justices to the Supreme Court of Canada. The new process was proposed by the Prime Minister in order to fill the seat on the SCC that became vacant on September 1, 2016 with the retirement of Justice Thomas Cromwell.[31] It resulted in the nomination of Justice Malcom Rowe.

[26] ALARIE, Benjamin; GREEN, Andrew. Policy Preference Change and Appointments to the Supreme Court of Canada, *Osgoode Hall Law Journal*, Toronto, vol. 47, n. 1, 2009, p. 1-46.

[27] LAWLOR, Andrea; CRANDALL, Erin. Questioning Judges with a Questionable Process: An Analysis of Committee Appearances by Canadian Supreme Court Candidates. *Canadian Journal of Political Science / Revue canadienne de science politique*, Outaouais, v. 48, n. 4, p. 863-883, December/décembre 2015.

[28] WHYTE, John D. Political accountability in appointments to the Supreme Court of Canada. *Constitutional Forum Constitutionnel*, Toronto, v. 25, n. 3, p. 109-118, 2016.

[29] ALARIE, Benjamin; GREEN, Andrew. Policy Preference Change and Appointments to the Supreme Court of Canada, *Osgoode Hall Law Journal*, Toronto, vol. 47, n. 1, p. 1-46, 2009.

[30] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[31] Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). Available at https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

The new procedure is rather a policy, as it was not incorporated into the Supreme Court Act. The new procedure has two features that deserve consideration: (i) an independent and non-partisan Advisory Board prepares for the Prime Minister a shortlist of candidates; (ii) two public hearings were added to the process: one of the Minister of Justice and the Chair of the Advisory Board to explain the selection process for the Members of Parliament, and another hearing in which the candidates should answer questions by parliamentarians. The Government's expressed intent was to provide a more transparent and constrained process. Nevertheless, criticisms arose on the basis that the process contains redundancies. These criticisms will be addressed in Chapter 4.

The procedure started with a public call for application open to anyone who fulfilled the statutory requirements. The applicant had to fill in a 22-page questionnaire about her professional career, personal qualities (including the state of health) and her opinion on the constitutional role of the judicial branch and the judges'. The candidate should also submit five decisions, legal documents or publications authored by her, and consent to a background check.[32] The Office of the Commissioner for Federal Judicial Affairs checked the applications and those reaching the formal criteria were forwarded to the independent Advisory Body.[33]

The Advisory Board was vested with "the task of identifying suitable candidates who are jurists of the highest caliber, functionally bilingual, and representative of the diversity of Canada".[34] The Advisory Board should provide the Prime Minister with non-binding, merit-based recommendations of three to five qualified and functionally bilingual candidates for consideration, as well as an assessment of each candidate and how they met the assessment criteria. The Minister of Justice should review the shortlist of candidates and consult with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers, and opposition justice critics, 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. After these consultations, the Minister of Justice should make

[32] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[33] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[34] Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). Available at https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

recommendations to the Prime Minister, who would pick the most appropriate and skilled candidate.[35]

After the choice has been made, the Minister of Justice and the Chairperson of the Advisory Board should appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the nominee meets the statutory requirements and the assessment criteria. The nominee should participate in a moderated question and answer session with members of the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from the Bloc Québécois and the Green Party.[36]

In the 2016 selection process, this second meeting took place at the University of Ottawa. The question and answer public session (also broadcast by the internet) was moderated by McGill University law professor Daniel Jutras. The questions made by the MPs were mainly about his french language skills, his opinion on the role of judges, and his attitude towards diversity. After this, he was formally appointed and sworn in.[37]

The Advisory Board for this selection process was established by the Governor in Council (GIC) on July 29, 2016 (Order in Council PC 2016-0693). The Terms of Reference for the Advisory Board were also approved by the GIC and made public through the same Order in Council. Its members, according to paragraph 127.1(1) (c) of the *Public Service Employment Act*, served as special advisers to the Prime Minister.[38]

The Terms of Reference outline the criteria for the membership of the Advisory Board:

- Three members, at least two of whom are not advocates or barristers in a province or territory, nominated by the Minister of Justice;
- A practising member in good standing of the bar of a province or territory, nominated by the Canadian Bar Association;

[35] Independent Advisory Board for Supreme Court of Canada judicial appointments. Available at https://pm.gc.ca/en/news/backgrounders/2017/07/17/independent-advisory-board-supreme-court-canada-judicial-appointments. Access nov 27 2020.

[36] Independent Advisory Board for Supreme Court of Canada judicial appointments. Available at https://pm.gc.ca/en/news/backgrounders/2017/07/17/independent-advisory-board-supreme-court-canada-judicial-appointments. Access nov 27 2020.

[37] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[38] Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

- A practising member in good standing of the bar of a province or territory, nominated by the Federation of Law Societies of Canada;
- A retired superior court judge, nominated by the Canadian Judicial Council; and
- A legal scholar, nominated by the Council of Canadian Law Deans.[39]

Within a month from the appointment, the Advisory Board should submit a report outlining how it fulfilled its mandate, including costs related to its activities and statistics related to the applications received. The Advisory Board may also make recommendations for improving the process. This report is to be made public for more accountability and transparency.[40]

The process was applied a second time in December 2017 for the replacement of the former Justice Beverly McLachlin. The 2017 process was opened by the Prime Minister on July 14, 2017. The composition of the Advisory Board followed the same rules as those regulating the 2016 nomination process.[41] This procedure ended up in the nomination of justice Sheilah Martin.

The process followed the same rules that had been set in 2016. The public hearing of the nominee was moderated by François Larocque, interim dean for the University of Ottawa Faculty of Law's common law section, where the nominee Sheilah Martin 'voiced support for better sexual assault education for judges, acknowledged the taut balancing act of competing Charter rights, and touted existing supports for jury members (...)'. Nevertheless, she avoided any answers that could touch upon future cases.[42]

In 2019 the new selection process was followed once more in order to fulfill the replacement of justice Justice Clément Gascon. The process ended up in the nomination of Justice Nicholas Kasirer.

Despite notable gains in transparency and accountability, criticisms and recommendations have been made in order to improve the process. They will be approached in next chapter.

[39] Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

[40] Independent Advisory Board for Supreme Court of Canada judicial appointments. Available at https://pm.gc.ca/en/news/backgrounders/2017/07/17/independent-advisory-board-supreme-court-canada-judicial-appointments. Access nov 27 2020.

[41] Independent Advisory Board for Supreme Court of Canada Judicial Appointments - Report on 2017 Process. Available at https://www.fja-cmf.gc.ca/scc-csc/2017-SheilahMartin/smartin-report-rapport-eng.html#bm02. Access Dec 1st 2020.

[42] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

4 Criticisms on the selection process

The improvements on the selection process in the period 2004-2014 (that institutionalized the participation of Parliament) and from 2016 on (with the participation of the Advisory Board) made the nomination of justices to the Supreme Court of Canada more transparent and accountable.

Nevertheless, some critics and recommendations have been made. The 2016 process report of the Avisory Board made these recommendations in order to instigate the improvement of the appointments process:

> *Timing of the Process*. The process unfolded during the summer months when many people were on vacation and often away from their offices. The time of year made it challenging for applicants to complete the application forms, compile the requisite information, and attend interviews should they be selected to meet with the Advisory Board.
>
> *Timeframe for Applications and Application Consideration*. Candidates were given a relatively tight timeframe within which to submit their complete applications. Given the length and the complexity of the application form and the amount of information requested, this required a lot of time, effort, and consideration on their part. (...)
>
> *Outreach is extremely important*. Outreach was extremely important, as many candidates indicated that they were encouraged by others to apply. We would encourage additional outreach activities moving forward in order to target a broad spectrum of candidates from various backgrounds, which will also require a longer timeframe to accomplish. (...)
>
> *Format of the application materials/forms*. The Advisory Board recommends that the application format and requirements be further studied in order to ensure a straightforward format and to provide an effective basis on which the Advisory Board may evaluate candidates.[43]

The Advisory Board of the 2017 selection process offered the following recommendations:

> *Timeframe for Applications Report to the Prime Minister*. Given the length and the complexity of the application form and the amount of information requested, a considerable amount of time and effort is required for candidates to complete and submit their applications. The 9-week period appears to have been sufficient, given the high-

[43] Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). Available at https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

> quality of the applications received. We would recommend not cutting back on this time for future processes. (...)
>
> *Advisory Board Deliberations*. The Board found it extremely helpful to have again met with the Chief Justice *before* commencing its in-depth review of the applications to hear her most recent views on the needs of the Court. We would strongly recommend that this consultation with the Chief Justice always be held early in the process. (...)
>
> *Format of the application materials/forms*. Feedback was received from candidates that, in order to respect the integrity of the process, they fully and candidly answered all the questions on the application form, including being forthcoming with respect to details about their personal lives. This was especially true when responding to the essay questions. Concern was expressed about the necessity of making all these details public, should they be chosen as the Prime Minister's nominee. Attention could be paid to this requirement, lest it discourage potential candidates from applying.[44]

The Advisory Board for the 2019 selection process offered recommendations on the following subjects:[45]

- *Timeframe for submission of applications*. (...) candidates had a short timeframe within which to submit their completed applications (four weeks).
- *Timeframe for applications report to the Prime Minister*. The time allowed to the Advisory Board to complete its work, that is, the time between the application closing date (May 17) and the submission of its shortlist to the Prime Minister (June 10), was very short, even more so than in 2016 and 2017. (...)
- *Lack of diversity among applicants*. The Board is preoccupied by the very limited number of women, as well as members of ethnic or cultural groups, visible minorities, Indigenous peoples, persons with disabilities, and LGBTQ2 applications for this process. (...)
- *Advisory Board deliberations*. The Board found it extremely helpful to have again met with the Chief Justice before commencing its in-depth review of the applications to hear his most recent views on the needs of the Court.

[44] Independent Advisory Board for Supreme Court of Canada Judicial Appointments - Report on 2017 Process. Availabel at https://www.fja-cmf.gc.ca/scc-csc/2017-SheilahMartin/smartin-report-rapport-eng.html#bm08. Access Dec 1st 2020.

[45] Recommendations on Improvements to the Appointments Process and Work of the Advisory Board. Available at https://www.fja.gc.ca/scc-csc/2019/nkasirer-report-rapport-eng.html#bm02. Access Dec 2nd 2020.

> We would strongly recommend that this consultation with the Chief Justice always be held early in the process. (…)

In its report on the new process for judicial appointments to the Supreme Court of Canada, the Standing Committee on Justice and Human Rights made the recommendation that the Advisory Board should be permanent and more diversified. It also complained that the hearing was not an official parliamentary hearing, so parliamentary privilege did not apply to protect both the members posing questions and the nominee answering them.[46]

It would also be advisable to give Legislative power not only a right to discuss but also to really participate. As a consequence, selection would be shared between different state organs and the elective and appointment system would be mixed.[47]

Despite all these criticisms and recommendations in order to improve the process, it can be easily noticed that the new nomination process is much more transparent, democratic and accountable than it was before 2016.

Conclusion

This paper exploring the selection of justices in a comparative perspective is part of a series named "Constitutional Law Around the Globe". This chapter of the series focuses on Supreme and Constitutional Courts and how they are shaped in many contemporary democracies.

First in the row, this paper focuses on the selection of justices to the Supreme Court of Canada. In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the selection of justices to the Supreme Court of Brazil in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such

[46] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

[47] BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

as in Canada, South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.[48]

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Equador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.[49]

This normative challenge to judicial review has been strengthened by constitutional law scholars arguing that judicial review asserts itself contrasting the elected branches. As such, it would be under suspicion in a democracy.[50] The processes under which democratic jurisdictions can shape the plurality, transparency, partisanship and accountability of Supreme Courts need further research and debate. The selection of justices plays a key role on the subject in many democracies. However, there are many variations among jurisdictions.

The Canadian system made a step towards transparency and accountability by involving Parliament in the process, as well as by the adoption of an independent non-partisan Advisory Board. However, it would be advisable to give Legislative power not only a right to discuss but also to really participate. As a consequence, selection would be shared between different state organs and the elective and appointment system would be mixed.[51]

Allowing the decision-making process and the selection criteria to be more transparent can help to enhance the authority and legitimacy a Supreme Court and could encourage public trust in its operation. The Canadian solution of making more transparent the selection criteria that are above and beyond the statutory requirements may be regarded as best practice in this field.[52]

Referências

ALARIE, Benjamin; GREEN, Andrew. Policy Preference Change and Appointments to the Supreme Court of Canada, Osgoode Hall Law Journal, Toronto, vol. 47, n. 1, p. 1-46, 2009.

48 KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. Consequential Courts. Judicial Roles in Global Perspective. New York. Cambridge University Press, 2013.

49 COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. *Cultures of Legality. Judicialization and Political Activism in Latin America*. New york. Cambridge University Press, 2010.

50 GINSBURG, Tom. *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*. New York. Cambridge University Press, 2003.

51 BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

52 BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the "writ of certiorari". Revista de Investigações Constitucionais, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020.

BAKAN, Joel. Just words. Constitutional rights and social wrongs. Toronto. Buffalo. London. University of Toronto Press, 2012.

BODNÁR, Eszter. The Selection of Supreme Court Judges. What Can the World Learn from Canada, What Can Canada Learn from the World? Available at https://eltelawjournal.hu/the-selection-of-supreme-court-judges-what-can-the-world-learn-from-canada-what-can-canada-learn-from-the-world. Access October 28th 2019.

BONAVIDES, Paulo. Curso de Direito Constitucional. São Paulo. Malheiros, 2007.

BICKEL, Alexander. The least dangerous branch. The Supreme Court at the Bar of Politics. New York. The Bobbs-Merrill Company, Inc., 1962.

CANADA. Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August – September 2016). Available at https://www.fja-cmf.gc.ca/scc-csc/2016-MalcolmRowe/mrowe-report-rapport-eng.html#bm02. Access Dec 1st 2020.

CANADA. Independent Advisory Board for Supreme Court of Canada judicial appointments. Available at https://pm.gc.ca/en/news/backgrounders/2017/07/17/independent-advisory-board-supreme-court-canada-judicial-appointments. Access nov 27 2020.

CANADA. Recommendations on Improvements to the Appointments Process and Work of the Advisory Board. Available at https://www.fja.gc.ca/scc-csc/2019/nkasirer-report-rapport-eng.html#bm02. Access Dec 2nd 2020.

COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. Cultures of Legality. Judicialization and Political Activism in Latin America. New York. Cambridge University Press, 2010.

DEVIN, Richard; DODEK, Adam. The Achilles heel of the Canadian judiciary: the ethics of judicial appointments in Canada, Legal Ethics, v. 20, n. 1, p. 43–63, 2017.

DODEK, Adam. The Canadian Constitution. Toronto. Dundurn, 2016.

KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. Consequential Courts. Judicial Roles in Global Perspective. New York. Cambridge University Press, 2013.

LAWLOR, Andrea; CRANDALL, Erin. Questioning Judges with a Questionable Process: An Analysis of Committee Appearances by Canadian Supreme Court Candidates. Canadian Journal of Political Science / Revue canadienne de science politique, Outaouais, v. 48, n. 4, p. 863–883, December/décembre 2015.

McCORMICK, Peter. Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada. The Journal of Appellate Practice and Process, Little Rock, Volume 7, Issue 1, Article 2, p. 1-42, 2005.

ROUSSEAU, Dominique. Droit du contentieux constitutionnel. Paris. Montchrestien, 2010.

SHAPIRO, Martin. Judicial Independence: New Challenges in Established Nations. Indiana Journal of Global Legal Studies, Bloomington, n. 20, pp. 253-277, 2013.

WEILER, Paul C. Rights and Judges in a Democracy: A New Canadian Version. University of Michigan Journal of Law Reform, Ann Arbor, vol. 18, issue 1, pp. 51-92, 1984.

WHYTE, John D. Political accountability in appointments to the Supreme Court of Canada. Constitutional Forum Constitutionnel, Toronto, v. 25, n. 3, p. 109-118, 2016.

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