SIZE AND COMPOSITION OF HIGHEST COURTS SELECTION OF JUDGES

by

Ana Martins*

*A. Introductory remarks***

The size and composition of highest courts – selection of the judges, which was the subject of the panel, whose discussion I was supposed to open, concerns, in my opinion, one of the most important issues in judicial theory.

In fact, the judges are not, and they have never been, neutral interpreters of Constitutions, laws or treaties. Therefore, the size and composition of courts, as well as the criteria of selection of judges, whether in highest courts (Supreme and Constitutional courts), or in International and European Courts, determines their decisions to a large extent.

As a matter of fact, in domestic law the judges are truly law-makers[1]. And the same reasoning can be applied to the European courts[2] (ECJ and CFI). Even in the

* Professor of Public Law, especially European, International and Constitutional Law, at the Faculty of Law – Lisbon University.

** I would like to express my deep gratitude to the organisation of the conference, and especially to Professor Ingolf Pernice, for having invited me to participate.

1 Although this is not an appropriate place to develop this issue see, above all, Karl Larenz, *Metodologia da Ciência do Direito*, (*Methodenlehre der Rechtwissenschaft*, 6th ed., translated by José Lamego), Lisbon, Fundação Calouste Gulbenkian, 1997, p. 519 et seq. See also in the Portuguese doctrine, Oliveira Ascensão, *O Direito – Introdução e Teoria Geral*, 11th ed., Lisbon, Almedina, 2001, p. 589 et seq.

2 See Iris Canor, *The Limits of Judicial Discretion in the European Court of Justice,* Baden-Baden, Nomos, 1998, p. 43 et seq; Margit Hintersteininger, "Zur Interpretation des Gemeinschaftsrechts"*, Zeitschrift für öffentliches Recht,* 1998, p. 253; Takis Tridimas, "The Court of Justice and Judicial Activism", *European Law Review*, 1996, p. 203 e ss; Joxerramon Bengoetxea, *The Legal Reasoning of the European Court - Towards a European Jurisprudence,* Oxford, 1993, *passim*; J.H.H. WEILER, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration"*, Journal of Common Market Studies*, 1993, p. 417 et seq.

context of international law, the courts have progressively acquired a more active participation in the law-making process[3].

The Constitution, the laws or the treaties that the judges interpret are to a large measure the interpretation of their own experience, their judgement about practical matters and their ideal pictures of the social order[4]. So, although frequently not recognized as such, the methods of selection of judges are, in reality, an expression of a much more fundamental philosophical and political choice[5].

B. Domestic Highest Courts

The political side of the highest courts' decisions cannot be underestimated. As it is well known, in domestic law, Supreme and Constitutional Courts can easily be involved in political and sensitive issues. Such is the case of the controversies over the right to abortion, affirmative action, the death penalty, and the separation of church and state[6], where the ideology of each judge plays a determinant role. Moreover, the decisions of these courts mainly concern the organisation and functioning of the political organs, the system of norms and the "political choice" of certain decisions, which affect individuals[7].

Everyone will agree that, in constitutional democracies, independence, impartiality, efficiency and quality of the decisions are the most relevant aims of judicial systems. However, the means to attain these objectives differ from State to State, and depend on a previous political choice.

As a matter of fact, one cannot deny the relationship, on the one hand, between the size, the composition of a court, the methods of selection and retention of judges,

3 With regard to the interpretation of international organisations treaties see, above all, Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales,* Paris, Pedone, 1981. Concerning the law-making capacity of the European Court of Human Rights see, for example, Olivier Jacot-Guillarmod, "Règles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme"*, in* Louis-Edmond Pettiti / Emmanuel Decaux / Pierre-Henri Imbert, *La Convention européenne des droits de l'homme. Commentaire article par article*, 2nd ed., Paris, Economica, 1999, p. 41 et seq.

4 See James E. Di Tullio / John B. Schochet, "Saving this Honourable Court: a Proposal to replace life tenure on the Supreme Court with Staggered, non-renewable eighteen-year terms", *Virginia Law Review,* 2004, p. 1095.

5 See Peter D. Webster, "Selection and Retention of Judges: is there one "Best" Method"*, Florida State University Law Review*, 1995, p. 1.

6 See Erwin Chemerinsky, "Ideology and the Selection of Federal Judges", *U. C. Davis Law Review,* 2002-2003, p. 621.

7 See Louis Favoreu, "La légitimité de la justice constitutionnelle et la composition des juridictions constitutionnelles", in *Legitimidade e Legitimação da Justiça Constitucional – Colóquio no 10º aniversário do Tribunal Constitucional*, Coimbra, Coimbra editora, 1995, p. 231.

and, on the other hand, the main purposes that each judicial system intends to achieve.

I. Appointment of judges

The judges of highest courts are usually appointed by political authorities[8]: the executive[9], as it occurs in United Kingdom, Australia, Canada[10], Finland, Norway or Malta; the parliament[11], such as in Germany[12] or Ukraine; or by both according to a mixed system[13], as, for instance, in United States of America, Israel, Lithuania, France, Greece or the Netherlands. Whatever may be the method for appointment of judges of highest courts, it always involves a political procedure[14], which founded the legitimacy of highest courts.

In Portugal the highest court in the hierarchy of courts of law is the Supreme Court of Justice, except for the specific responsibilities of the Constitutional Court[15]. Appointment to the Supreme Court of Justice shall be determined by a competitive submission of curricula by judges, public prosecutors and other meritorious members of the legal profession, as laid down by law[16]. By contrast, the Portuguese Constitutional Court is composed by thirteen judges, ten of whom shall be appointed by the Assembly of the Republic and three co-opted by those ten[17]. Six of the judges who are appointed by the Assembly of the Republic or are co-opted shall obligatorily be chosen from among the judges of the remaining courts, and the others from among jurists[18].

8 See Marcelo Rebelo de Sousa, "Legitimação da justiça constitucional e composição dos tribunais constitucionais, in *Legitimidade e Legitimação da Justiça Constitucional – Colóquio no 10º aniversário do Tribunal Constitucional*, Coimbra, Coimbra editora, 1995, p. 218, 219.

9 See Daniel ten Brinke / Hans-Michael Demi (ed.), *Judges in the Service of the State? Procedures, Criteria and Political Influence on National Selection of Judges for the Highest Judicial Offices and their Possible Influence on the International Criminal Court,* p. 9 et seq.

10 See the contribution on this volume of Chief Justice Beverley McLachlin on the Structure and Role of a Supreme Court in a Federal System – the Canadian Experience.

11 See Daniel ten Brinke / Hans-Michael Demi (ed.), *Judges in the Service of the State?...,* p. 37 et seq.

12 See the contribution on this volume of Peter Häberle on Role and Impact of Constitutional Courts in a Comparative Perspective.

13 See Daniel ten Brinke / Hans-Michael Demi (ed.), *Judges in the Service of the State?...*, p. 55 et seq.

14 See Louis Favoreu, "La légitimité…", at p. 233.

15 See Article 210 (1) of Portuguese Constitution.

16 See Article 215 (4) of Portuguese Constitution.

17 See Article 222 (1) of Portuguese Constitution.

18 See Article 222 (2) of Portuguese Constitution.

II. Quality of judges

Another important issue in this context relates to the quality of judges, in order to achieve the main purpose of each judicial system, that is to say good decisions. Consequently, the judges must present a certain number of moral qualities and features, as well as professional skills. Generally, they must not only have a law degree, but also accumulate some experience in legal matters or even be a judge[19]. Such is the case, amongst others, in Austria, Italy, Spain, Germany and Portugal. The exception to this rule comes from France, where a judge of the *Conseil Constitutionnel* may not be a lawyer.

III. Term in office

With regard to the length of term in office of the judges, the analysis of some Supreme and Constitutional courts reveals a real diversity of solutions. In fact, the choice between life tenure, in the U.S. Supreme Court[20], or long terms – nine years – in the Constitutional Courts in Italy, Spain and Portugal[21] – or eight years – in the German *Bundesverfassungsgericht*, is far from being innocent. This option will, indeed, affect and influence the case law of the court, especially when sensitive matters are concerned.

When the term in office of judges is temporary, it is necessary to decide whether it is renewable or not, as well as whether a mandatory retirement age is acceptable or not. In Portugal the term in office of judges of the Constitutional Court is not renewable[22].

One of the countries, where the term of office and the criteria of selection of judges have been more intensively discussed, is the United States of America. The debate over the independence of the judges of the U. S. Supreme Court, and the means to achieve it, is older than the American Constitution, as can be confirmed by the divergences of the founding fathers Hamilton[23] and Jefferson that had been expressed since the very beginning of the American constitutionalism.

In reality, life tenure of judges guarantees their independence. However, it is not the only means to attain this goal. Long, non-renewable terms are also appropriate.

In addition, as it is generally accepted nowadays, it is far away from being a perfect system, as it allows strategic retirements based on which President will nomi-

19 See Marcelo Rebelo de Sousa, "Legitimação da justiça constitucional...", p. 219.

20 See Article III of United States Constitution that states: «Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour».

21 See Article 222 (3) of Portuguese Constitution.

22 See Article 222 (3) of Portuguese Constitution.

23 See The Federalist No. 78, where Alexander Hamilton wrote in support of judicial life tenure. For him, it was essential to assure the absolute independence of the judiciary from the influence of the political "branches".

nate the successors[24], incentive for young nominees, excluding better candidates, who are older[25], and random distribution of appointments between the Presidents[26].

Otherwise, life tenure allows that judges, who have already lost their intellectual capacities, remain in office, in detriment of the efficiency and, above all, the good quality of judicial decisions.

Taking this scenario into account, one has to reflect if in national legal order there is one «best» method for selecting judges for highest courts. Or to put it in other words, whether it is possible to find out a method that can simultaneously, and in equal terms, assure independence, impartiality, efficiency and good decisions.

Another concern should be the ideology of the judges of highest courts. In fact, when a Court applies fundamental rights, such as it occurs with all Constitutional Courts and the majority of Supreme Courts, it is in the last instance responsible for defining values. Therefore, one can hardly see how it is possible to choose the judges without taking their ideology into consideration[27]. Furthermore, the organs that choose the judges of highest courts – executives, parliaments, etc – are themselves strongly compromised with a certain ideology, which will certainly play a role in the decisive moment of the choice.

C. International Courts

Turning now to international courts, one has to underline that, at least apparently, the first aim of the selection of judges in international law is to produce a judicial body of independent members rather than state representatives[28]. In order to attain this goal, the procedure of appointment of judges for international courts – either universal or regional – combines both legal and political elements and, at least in principle, seeks to exclude as far as possible the influence of national states[29].

Taking the example of the International Court of Justice, the members of the Court are elected by the General Assembly and Security Council voting separately, regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to

24 See James E. Di Tullio / John B. Schochet, " Saving this Honourable Court…", p. 1101 et seq.
25 See James E. Di Tullio / John B. Schochet, " Saving this Honourable Court…", p. 1110 et seq.
26 See James E. Di Tullio / John B. Schochet, " Saving this Honourable Court…", p. 1116 et seq.
27 See Luís Nunes de Almeida, "Da politização à independência (algumas reflexões sobre a composição do Tribunal Constitucional)", *in Legitimidade e Legitimação da Justiça Constitucional – Colóquio no 10º aniversário do Tribunal Constitucional*, Coimbra, Coimbra editora, 1995, p. 243.
28 See the contribution on this volume of Christian Tomuschat on National Representation of Judges and Legitimacy of International Jurisdictions – Lessons from ICJ to ECJ.
29 See Malcolm N. Shaw, *International Law*, 5th ed., Cambridge, Cambridge Univ. Press, 2003, p. 961.

the highest judicial offices, or are jurisconsults of recognised competence in international law.

In accordance with the exclusion of the national influence, the Statute provides in article 31 that judges of the nationality of each of the parties in a case before the Court shall retain their right to sit in that case.

However, the same provision states that the parties to a dispute before the ICJ are entitled to choose a person to sit as judge for the duration of that case, where they do not have a judge of their nationality there already. This is the so called procedure of *ad hoc* judges[30], which is not exclusive of the International Court of Justice, but common to many international courts, such as the International Tribunal for the Law of the Sea[31], the Inter-American Court of Human Rights[32] and the European Court of Human Rights[33].

Although there are good reasons to justify this procedure, such as the good administration of justice and the equality of the parties[34], it has also attracted much criticism, since the appointment of an *ad hoc* judge certainly affects the character of the Court as an independent organ of legal experts. Nevertheless, one has to say that the *ad hoc* judge does not support the Defendant State.

As a matter of fact, in the current stage of the evolution of international law it is rather difficult to avoid completely the judicial decisions' politicisation. The international legal order is still somewhat dependent from States, which prevents, indeed, the total independence of judges.

D. European Union Courts

Before concluding, let me just provide a glimpse into the European Union Courts. According to the EC Treaty, all judges of the European Court of Justice as well as of the Court of First Instance shall be appointed «by common accord of the Governments of the Member States»[35]. The term of office is six years and the appointment of new judges or reappointment of the existing judges is staggered so that there will be a replacement of judges every three years.

30 See Nguyen Quoc Dinh / Patrick Daillier / Alain Pellet, *Droit International Public,* 7 th ed., Paris, LGDJ, 2002, p. 892 et seq.

31 See Nguyen Quoc Dinh / Patrick Daillier / Alain Pellet, *Droit International…*, p. 913.

32 See Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights,* Cambridge, Univ. Press, 2003, p. 10.

33 See Jean-François Renucci, *Droit Européen des Droits de l'Homme*, 3rd ed. Paris, LGDJ, 2002, p. 581.

34 See Nguyen Quoc Dinh / Patrick Daillier / Alain Pellet, *Droit International…,* p. 893.

35 See Article 223 of EC Treaty.

In accordance with the EC Treaty, the independence of a judge or an Advocate General of the ECJ is an important matter, as the qualifications for selection require «persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence»[36]. The same can be said for the appointment of judges to the CFI.

Taking the procedure of appointment, the length of the term in office and the possibility of reappointment into account, some commentators have also questioned the independence of the judiciary in the European Union[37]. However, the secrecy of the Court's deliberations may be a protection against perceived political appointments or refusals to renew, although this does not apply to the Advocate General whose individual opinions are made public. In practice, most judges have been reappointed.

Although Member States normally select their own nationals, which is not an obligation, the EC Treaty requires that the judges are entirely independent of the government which chooses them or indeed of any other interest group.

In practice, the nationality of the judges has had little influence on the decision-making, but one cannot say that the Court is completely immune from political pressures, and undoubtedly does not ignore the general wishes and interests of the Member States in its decision-making[38]. Sometimes its judgments are influenced by non-legal arguments invoked by Member States, particularly when they relate to the potential financial impact of a ruling[39].

In order to reinforce the independence of the judges, and consequently the legitimacy of the European Courts, the Treaty establishing a Constitution for Europe introduces a body composed by seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament, which is supposed to give an opinion on candidates' suitability to perform the duties of Judge or Advocate-General of the Court of Justice and the General Court, before the Member States make the appointments[40]. That means that, if the European Constitution comes into force, the current procedure of appointment of Judges and Advocates-General will not substantially change, since the opinion of this experts' body will not be binding. Therefore, the real appointment power remains in the Member States.

To sum up, the search of the best method to select judges either in domestic courts or in European or International ones reveals itself a never ending story, as

36 See Article 223 of EC Treaty.
37 See Paul Craig / Gráinne de Búrca, *EU Law – Text, Cases and Materials,* 3rd ed., Oxford, Oxford Univ. Press, 2003, p. 88.
38 See Paul Craig / Gráinne de Búrca, *EU Law…*, p. 89.
39 See Case 43/75, *Defrenne v, Sabena (Defrenne II)*, [1976] ECR 455.
40 See Art. III-357 of the Treaty establishing a Constitution for Europe.

every method comprises advantages and disadvantages. As a consequence, the only reasonable way to put this question is to assume the imperfection of every system.