

# COMPOSITION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

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## Abstract

*German Federal Constitutional Court (hereinafter: FCC) is famous for its effective competencies and constitutional interpretation according to the current political affairs within the legal framework. Nevertheless, the formation of the Court is not consistent with the international recommendation of judicial independence because of the Federal Constitutional Court, Federalism, Separation of Powers, Selection of Judges, Judicial independence. Judges cannot participate in the appointment procedure even under the Basic Law, 1949. Just the legislature; Bundestag and Bundesrat select the judges and the federal president appoints them. Therefore, this research explores why the judges cannot take part in the appointment process of the members of the FCC and how it is reasonable under German constitutionalism.*

**Keywords:** *Federal Constitutional Court, Federalism, Separation of Powers, Selection of Judges, Judicial independence.*

The research methodologies I used in this paper are qualitative research methods and textual analysis.

The research aim is to learn the German way of practicing the separation of powers and federalism without sharing the power to the judiciary to select the Constitutional Court's judges.

The research conclusion is to conclude the independence of the FCC from the influence of the executive and legislature, especially the selection mechanism following the international legal standard.

Separation of powers under the German concept emphasizes the protection of interests of citizens relative to the state and to prevent the state from becoming all-powerful. State power is divided into three functions and they are allowed to the

competencies to limit and control each other.<sup>1</sup>

German constitutionalism is famous not only for the Weimar and but for the Basic Law because there are several great changes and differences between those two laws depends on the times and circumstances. The Weimar Constitution made points of the Republic of Reich, the composition of government with the President, a Chancellor and a Parliament, the minimum voting age is twenty, the seven-year term of office for the President, fundamental human rights, and so on.<sup>2</sup> The present Basic Law establishes the Federal Parliamentary Democracy and highlights the federalism because of the lander, parliamentary democracy represented by the Bundestag and Bundesrat.

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<sup>1</sup> Federal Ministry of the Interior. (2014). The Federal Public Service. P-14. (Accessed on 29 Oct 2020). Retrieved from [www.bmi.bund.de/download/publikationen/federal-public-service.pdf](http://www.bmi.bund.de/download/publikationen/federal-public-service.pdf).

<sup>2</sup> History. (2020). The Weimar Republic. (Accessed on 23 Oct 2020). Retrieved from <https://www.history.com>.

Judicial power is practiced by the lower courts and six federal courts of

1. The Federal Constitutional Court <sup>3</sup>
2. The Federal Court of Justice in Karlsruhe (Civil and Criminal cases)
3. The Federal Labor Court in Erfurt (Labor cases)
4. The Federal Administrative Court in Leipzig (Administrative Cases)
5. The Federal Social Court in Kassel (social security and social welfare cases)
6. The Special Finance Court in Munich (Tax cases)<sup>4</sup>

The judicial powers are vested in the judges and it shall be exercised by the Federal Constitutional Court, by the federal courts established by the Basic Law, and by the courts of the lander.<sup>5</sup>

Despite all courts have the authority and the responsibility to review the constitutionality of government actions and the legislation within their competencies, only the Federal Constitutional Court in Karlsruhe can pronounce the unconstitutionality of legislation. Other courts shall suspend the proceedings if they find a statute is against the Basic Law and the case must be submitted to the FCC.<sup>6</sup>

The FCC is famous in Europe and the European Union because of its

independence in the constitutional adjudication in the political affairs within the legal framework.<sup>7</sup> The classical area for examining the relationship of judges to politics is a constitutional review.<sup>8</sup> But, the Court is not a political body on the ground that its sole standard of review is the basic law.<sup>9</sup> Likewise, the Court is very famous for its discretionary power to adjudicate human rights protection and the interpretation of the Basic Law of Germany. German legal system became independent under the Basic Law 1949, and before this constitution, there was a Weimar Constitution 1919, and the Courts and legal system of Germany were also not significant like the other illiberal countries. However, the Basic Law describes that the structure and jurisdiction of the FCC in broad terms but the composition of the court; appointment process, tenure of the terms, and numbers of justices are left to the legislature by enacting the Act on the FCC in 1951.<sup>10</sup>

In Europe, the Austria Constitutional Court is the first establishment of a separate constitutional court in 1920 and 1946 in Italy. German FCC was set up in 1951 and it is the highest tribunal and an apex court

<sup>3</sup> Article 92, Basic Law for the Federal Republic of Germany, 1949.

<sup>4</sup> Article 95(1), Basic Law for the Federal Republic of Germany, 1949. See also Fiano O'Connell & Ray McCaffrey. (2012). Judicial Appointment in Germany and the United States, Research and Information Service, Northern Ireland Assembly. Retrieved from [www.niassembly.gov.uk/globalassets/Documents/RalSe/...](http://www.niassembly.gov.uk/globalassets/Documents/RalSe/...)

<sup>5</sup> Federal Ministry of the Interior. (2014). *Supra note 1*. Retrieved from [www.bmi.bund.de/download/publikationen/federal-public-service.pdf](http://www.bmi.bund.de/download/publikationen/federal-public-service.pdf).

<sup>6</sup> Britannica, Germany-Justice. (Accessed on 27 Oct 2020). Retrieved from <https://www.britannica.com>.

<sup>7</sup> Prof. Dr. Jur. Thomas Henne. (2019). The History and Structure of German Basic Law- The Fundamental Structural Principles of the Federal Republic of German. Introduction to German basic Law Lectures (6-10/5/2019), University of Debrecen, Faculty of Law.

<sup>8</sup> John. Bell. (2006). *Judiciaries within Europe*, Cambridge University Press. P-5. (This book is downloaded from the John Bell Online Library).

<sup>9</sup> The Federal Constitutional Court. (2020). Retrieved from [www.bundsverfassungsgericht.de](http://www.bundsverfassungsgericht.de).

<sup>10</sup> Georg Vanberg. (2000). Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of powers, *Comparative Politics*, Vol 32(3), P 336 (333-353).

under the judicial hierarchy.<sup>11</sup> Furthermore, it is the first court of the republic and the unique constitutional organ that can protect the violation of basic rights guaranteed by the Basic law of Germany.<sup>12</sup> Any citizen may, on the exhaustion of his or her legal process through the ordinary courts of law, claim legal remedy to the FCC. And the decisions of the Court have a binding effect on the constitutional institutions of the Federation, the Lander, other federal and ordinary courts, and authorities as well.<sup>13</sup> German democracy has given a new elite role to the judiciary as guardian of fundamental rights.<sup>14</sup> After the legal concepts in the former constitution was changed and the sector of the FCC turned crucial with the emergence of the new Basic Law 1994. The drafters of the Basic Law already had the experience of good and bad to create a new constitution and they knew very well to change the Weimar constitutional notions to sophisticated ideology. Therefore, the aims and purposes of the original framers are always taken into consideration in interpreting the Basic Law in Germany and their contributions in the previous time are still honorable and memorialized until at the present in German legal history.

### 1.1 Structure of the Federal Constitutional Court

The FCC is both a court and a constitutional organ which is composed of

two senates. One Senate is chaired by the President of the Court and the other is chaired by the Vice-President. Each senate has eight judges and half of them are elected by the Bundestag and Bundesrat. They may not be members of the Bundestag, Bundesrat, Federal Government, or of any of the corresponding bodies of land.<sup>15</sup> The first senate is called the fundamental rights senate and it is dealt with the constitutional complaints. The second one is the court for state matter and concerned with the federation and lander and proceeding on disputes between constitutional organs and with the constitutional complaints also.<sup>16</sup> The Act on the FCC mentions the competencies of the First Senate for judicial review proceeding in which the main issue is the alleged incompatibility of a legal provision with fundamental rights of equal citizenship, ban on extraordinary courts, fair trial, and deprivation of liberty under the Basic Law and the constitutional complaints with some exceptions under the laws relating to the FCC. The Second Senate has competence for judicial review proceedings and constitutional complaints not assigned to the First Senate. Where there is doubt as to which Senate has jurisdiction in a given case, a plenum comprising the president and vice president of the Court and two judges

<sup>11</sup> Hans G. Rupp. (1969). The Federal Constitutional Court in Germany: Scope of its jurisdiction and procedure. *Notre Dame Law Review*, Volume 44:4(3), P-548.

Retrieved from <http://scholarship.law.nd.edu/ndlr/vol44/iss4/3>.

<sup>12</sup> Hans-Ernst Bottcher. (2004). The Role of the Judiciary in Germany. *German Law Journal*, Vol 5, No 10. P 1328 (Pp 1317-1330).

<sup>13</sup> Article 31(1), Act on the Federal Constitutional Court, 1951.

<sup>14</sup> John Bell. (2006). *Judiciaries within Europe*, Cambridge University Press. P- 109.

<sup>15</sup> Article 94(1), Basic Law for the Federal Republic of Germany, 1994.

<sup>16</sup> The Federal Constitutional Court. (2019).

Retrieved from [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

from each Senate decides.<sup>17</sup> Both panels have different competencies and they are independent of each other. Each judge is elected to one panel only and each panel has a quorum if at least six justices attend.<sup>18</sup> The important cases are decided by the entire body.<sup>19</sup> Nevertheless, the decisions of each Senate are always decisions of the FCC.<sup>20</sup> The most important competencies concerning the control of government and parliament are the abstract and concrete judicial review and the constitutional complaint.<sup>21</sup> Regarding the significance of the German FCC, the Justice Wiltraut Rupp-v. Brunneck recommended that the Court is a political organization of State, on the same level as the Federal Executive and Legislative branch (Bundestag and Bundesrat). Thus, the Court's highly responsible task is only one part of the whole functioning of the state organization and requires cooperation with these other organs of state. Such a view does not diminish the Court's importance as an institution to safeguard the separation of powers and to protect individual rights.<sup>22</sup> The Court has presumed as a true guardian of the constitution Germany's modern democracy as to the protection of basic rights.<sup>23</sup>

The present allocation of competencies between the Senates subject to the statutory

framework and Orders of the Plenary modifying. It seems that the Second Senate has a variety of responsibilities relating to the disputes between the Federation and the Lander, proceeding for the political parties, and electoral complaints, judicial review, constitutional complaints and it has the competence for the specific areas of law such as asylum law, the right of residence, nationality law, the law about the civil service, military service law, and alternative civilian service law, material and procedural criminal law including the enforcement of measures for the deprivation of liberty, proceeding on administrative fines, income and church tax law and proceedings that specifically linked to the interpretation and application of international law. The First Senate conducts especially for the judicial proceedings and constitutional complaints.<sup>24</sup>

## 1.2 Appointment and nomination of the Judges

The appointment and nomination procedure of a Supreme Court's or Constitutional Court's judges plays one of the important roles to measure how the judiciary is independent and to be interested in Constitutional law of a given state. In the Constitutional history of German Federal

<sup>17</sup> Constitutional Law of 15 EU Member States. (2004). Lucas Prakke, Constantijn Kortmann (Eds), Kluwer, Deventer, P-357.

<sup>18</sup> Article 15, the Act on the Federal Constitutional Court, 1951.

<sup>19</sup> See *supra note 1*.

<sup>20</sup> The Federal Constitutional Court. (2020).

Retrieved from [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

<sup>21</sup> Christine Landfried. (1985). *The Impact of the German Federal Constitutional Court on Politics and Policy Output*, Cambridge University Press. P 522 (pp522-541).

<sup>22</sup> Wiltraut Rupp-v. Brunneck. (1972). *Germany: The Federal Constitutional Court*, *The American Journal of Comparative Law*, Vol 20(3), P 401(Pp 387-403).

Retrieved from <https://www.jstor.com/stable/89311>.

<sup>23</sup> Konrad Adenauer Stiftung. (2020). *Landmark Decision of the Federal Constitutional Court in the Area of Fundamental Rights*. (Accessed on 7 Oct 2020).

Retrieved from [kas.de/de/einzeltitel/-/content/landmark-decisions-of-the-federal-constitutional-court-in-the-area-of-fundamental-rights-v2](http://kas.de/de/einzeltitel/-/content/landmark-decisions-of-the-federal-constitutional-court-in-the-area-of-fundamental-rights-v2).

<sup>24</sup> Allocation of Competences- German Federal Constitutional Court. (2020).

Retrieved from [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

Constitutional law, the appointment and nomination processes are conducted mainly by the Bundesrat and Bundestag.<sup>25</sup> The models of judicial appointments in Germany are subject to political involvement at various levels.<sup>26</sup> As a result, the judiciary is seemed not to be independent of the influence of the legislature and executive. Nevertheless, judicial power is vested theoretically in the judges and the Federal Courts, federal courts provided for in the Basic law and the courts of the Lander.<sup>27</sup>

The four systems of appointment examined by the United States Institute of Peace are that:

1. Appointment by political institutions
2. Appointment by the judiciary itself
3. Appointment by a judicial council (which may include laymen)
4. Selection through an electoral system<sup>28</sup>

The modes mentioned above are the procedures of appointment discovered by the United State Institute of Peace and addition to the Italian legal scholar, G. Oberto studied that the four typologies of appointments as follow:

1. Nomination by the executive
2. Election
3. Co-option
4. Appointment by a committee consisting of judges and academics following a competitive process.<sup>29</sup>

According to Professor John Bell remark relating to the appointment process of Germany, “there is a split between those landers which has a judicial appointments committee and those which have

appointments by the Minister of Justice. In consequence, judges are elaborated in an advisory capacity by way of their representative organ.”

There is no exact norm concerned with the appointment of Constitutional Courts’ judges in Europe. The approaches of judicial appointments cannot be the same depending on the different legal systems.<sup>30</sup> However, legislature and executive always take part in the procedure of judicial appointment in most of the countries whether parliamentary systems or non-parliamentary systems they apply. The appointment procedure in the part of the highest court or constitutional court should be taken into consideration enormously because of their pivotal position in the interpretation and safeguarding of the constitution and protection of constitutional rights as well. Even though, some European countries that have been established Judicial Council to perform judicial appointments independently assisting the composition of the Constitutional Court under the international standard, some constitutional conflicts can still happen like Poland’s constitutional crisis in 2015.

According to the opinion of Jean Michael on the appointment of the judges is based on the very fundamental principle of the German Constitution: federalism and democracy. Half of the 16 judges are elected by the Bundesrat, the Federal Council represents the German Lander in the federal legislative process. Hence, half of the judges are elected by the representatives of the Lander’s governments. A German legal

<sup>25</sup> Article 94, the Basic Law for the Federal Republic of Germany 1949.

<sup>26</sup> See *supra* note 1.

<sup>27</sup> Article 92, *Ibidem*.

<sup>28</sup> United States Institute Peace. (2009). Judicial appointment and Judicial Independence. Retrieved from [www.usip.org](http://www.usip.org).

<sup>29</sup> John Bell. (2006). *Judiciaries within Europe: A Comparative Review*, Cambridge University Press, Cambridge.

<sup>30</sup> Paul Bovend’Eert. (2018). *Recruitment and Appointment of judges and justices in Europe and the US: Law and Legal Culture*. (Accessed on 7 Sep 2020).

Retrieved from [www.nvvr.org](http://www.nvvr.org).

scholar concluded that it is an essence of the principle of federalism. According to him, the rest are elected by the Federal Parliament, Bundestag and it stands for the principle of democracy as it is a constitution's main democratic organ.<sup>31</sup> The notable thing is that the main parties need to reach a consensus on judiciary appointments to make sure a nominee gets a majority.<sup>32</sup>

Regarding the outstanding recommendation of Dieter Grimm, "the election requires a two-thirds majority and it has opened into an informal agreement between the two big political parties of the Christian Democrats (CDU) and Social Democrats (SPD), agree informally each other to elect judges and the small political parties can transfer their powers of nomination judges to the big ones following to the system of coalition governments. The system is criticized for the lack of clarity because the nomination is followed by negotiation among the big political parties. However, setting up the high qualifications to become a Constitutional Court's justice is a constitutional standard to avoid at most participation of the partisan persons in the constitutional adjudication."<sup>33</sup>

The federal judges are appointed by the President after being elected. The judges are elected for life tenure by the Judges Election Committee that is formed based on the Lander and the Bundestag. The Justices

of the Federal Constitutional Court are elected by the legislature and there is no judicial council in this case.<sup>34</sup> Hence, legislature and executive so-called political institutions manage the appointment proceeding in Germany. Reelection is possible for the latter.<sup>35</sup> Besides, under the Act on the Federal Constitutional Court, a Selection Committee formed by the Bundestag proposes a list of the justices and they need to get the majority votes of the members of the Bundestag to become members of the Federal Constitutional Court. The requirement of two-thirds majorities prevents a politically one-sided composition of the Court and even of each panel.<sup>36</sup> The Bundestag shall elect a Selection Committee which shall be composed of twelve members from itself.<sup>37</sup> This Selection Committee can be considered to be unconstitutional because the composition of judges has to conduct by the Bundesrat and Bundestag under the first paragraph of Article 94. The Court declared that the appointment of judges by the Selection Committee on behalf of the Bundestag is constitutional as the Court wanted to avoid issuing a ruling of its formation was unconstitutional for many years.<sup>38</sup> The FCC declared the appointment of judges by the Selection Committee on behalf of the Bundestag is constitutional as the Court wanted to avoid its formation was

<sup>31</sup> Martin Heidebach. (2014). The election of the German Federal Constitutional Court's judges – A lack of Democracy? *Ritsumeikan Law Review*, no.31, P 153 (Pp153-160). Retrieved from [www.ritsumei.ac.jp](http://www.ritsumei.ac.jp).

<sup>32</sup> Jean-Michel Hauteville. (2018). Why even Germany's Federal Constitutional Court has a political problem. Retrieved from [www.handelsblatt.com/English/politics/handelsblatt](http://www.handelsblatt.com/English/politics/handelsblatt).

<sup>33</sup> Dieter Grimm. (2017). Federal Constitutional Court of Germany (Bundesverfassungsgericht), Oxford University Press (2020). (Accessed on 30 Oct 2020). Retrieved from <https://oxwn.ouplaw.comlaw.com/10.1093/law-mpeccol/law-mpeccol-e528>.

<sup>34</sup> *Supra note 16*.

<sup>35</sup> Hans G. Rupp. (1969). P-549.

<sup>36</sup> Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, *Ritsumeikan Law Review*, No 31. P-102 (Pp94-118). Retrieved from [www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf](http://www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf).

<sup>37</sup> Article 6, Act on the Federal Constitutional Court, 1951.

<sup>38</sup> Rudolf Streinz. (2014). P-102-103.

unconstitutional. In this way, the Court makes politics in the spirit of consensus and decides in harmony with the powerful factors of political life, according to the finding of Preuss.<sup>39</sup> The appointment by the political bodies like Bundestag and Bundesrat makes the FCC democratically legitimacy.<sup>40</sup> Nonetheless, the Court has limited democratic legitimacy only when it decides on policy-making and constitutional interpretation.<sup>41</sup> There were some complaints from those who had not chosen by the Bundestag after the selection process.<sup>42</sup> The judiciary wanted to remove political interference from the process. Nevertheless, the legislature set aside that approach according to the worry that the judiciary would be insulated from the democratic concerns of the democratic authorities.<sup>43</sup> It was connected to the promotion of federal judges by the consent of the federal minister with an advisory opinion by the judicial council. Several scholars pointed out there is an advisory board conducting the judges to appoint the federal judges and it seems not transparency. And emphasizing again on the previous authors; Fiona O' Connel & Ray McCaffrey, the core political parties and the legislature

rejected the judges' proposal of judicial self-government by showing the reason for violating the fundamental principles of the parliamentary regime and the democratic responsibility of the judicial function.<sup>44</sup>

In Europe, the legislatures appoint judges of the Constitutional Courts in Germany, Poland, and Hungary. Regarding German to the German appointment system, although all sixteen judges are appointed by the Bundestag and Bundesrat, six of them, each three from both Senates, have to be judges of one of the federal supreme courts.<sup>45</sup> It is to make sure that judges of the Federal Constitutional Court are well-established experience.<sup>46</sup> The President and Vice President of the Court are elected in the same manner alternately by the Bundestag and Bundesrat. They may not both preside the same panel.<sup>47</sup> The other federal judges are appointed by a committee formed by the Ministry of Justice and Consumer Protection, all state ministers of justice, and an equal number of members elected by the Bundestag.<sup>48</sup> According to the career nature of judges, they habitually start their occupations at a court of the first instance in the employment of one of the lander. The Ministry of Justice within the lander

<sup>39</sup> Christian Landfried. (1994). The Judicialization of Politics in Germany, *International Political Science Review*, Vol 15(2), P-118(113-124). (Accessed on 10 Nov 2020). Retrieved from <https://www.jstor.org/stable/1601559>.

<sup>40</sup> Rudolf Streinz. (2014). p. 103.

<sup>41</sup> Christine Landfried. (1994). p.119.

<sup>42</sup> Jenny Gesley. (2016). How Judges are selected in Germany. Retrieved from [www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/](http://www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/)

<sup>43</sup> Fiona O' Connel & Ray McCaffrey. (2012). Judicial Appointments in Germany and the United States, Research and Information Service Research Paper, Northern Ireland Assembly. P-9. (Accessed on 4 Nov 2020). Retrieved from [www.niassembly.gov.uk/.../2012/justice/6012pdf](http://www.niassembly.gov.uk/.../2012/justice/6012pdf).

<sup>44</sup> Carlo Guarnieri. (2006). Appointment and Career of judges in continental Europe: the rise of judicial self-government. P-175. (pp 169-187).

<sup>45</sup> Katalin Kelemen. (2013). Appointment of Constitutional Judges in a Comparative Perspective- with a proposal for a New Model for Hungary, *Acta Juridica Hungarica*, Vol 54(1), P-17 (pp 5-23). Retrieved from [www.akjournals.com](http://www.akjournals.com)

<sup>46</sup> Dr. Gotthard Wohrmann. (2001). The Federal Constitutional Court: an Introduction. (Accessed on 27 Oct 2020). Retrieved from <https://www.iuscomp.org/gla/literature/inbverfg.htm>.

<sup>47</sup> Article 9 and 15, the Act on the Federal Constitutional Court, 1951.

<sup>48</sup> Article 95(2), the Basic Law for the Federal Republic of Germany, 1949.

organize the recruitment process, provided that the appointment for the social and labor courts because they are under the jurisdiction of the Ministry of Labor and Social Affairs. That is why some legal scholars remarked that the advisory boards including judges may take part in the appointment of the justices of the FCC.

According to the author Katalin Kelemen, the appointment of constitutional court judges is a point to secure the independence of the judiciary, but in practice, judges are relied on political parties to become constitutional court justices. In this case, political beliefs should be the same as the parties and judges those who have been chosen by the parties concerned. Even in the U.S., a Supreme Court judge directly appointed by the President (Trump) did not follow the President's policy after selection but initiative to the public benefit.<sup>49</sup> The judges retain and demonstrate their independence after their election.<sup>50</sup> Nevertheless, those judges who have been appointed by the politicians are protected by the constitutional laws at the domestic level and European legal standard in Europe and the European Union.<sup>51</sup> However, there were already some conflicts regarding the independence of the judiciary in Poland and the violations of the principle of irremovability of judges in Hungary.

The Venice Commission recommended the split model or mixed

model of appointment giving an example of the German style of appointment conducting by the representatives from the sixteen landers of Bundesrat and a two-third majority of Bundestag even though the judiciary cannot participate in the appointment mechanism.<sup>52</sup> The real style should be an equal appointment between the legislature, executive, and judiciary and it is named as the split model.<sup>53</sup>

Regarding the separation of powers, the famous justice of the U.S., James Madison, concluded that the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may just be pronounced the very definition of tyranny.<sup>54</sup>

There are the qualifications that are fundamentally important to the procedure of selecting and appointing of Federal Constitutional Court's justices. Hence, the author, justice chief, Supreme Court of New Jersey, Arthur T. Vandervilt, quoted as "The Law as administered cannot be better than the judge who expounds it [...] the best organization of the courts will be ineffective if the judges who man it are lacking the necessary qualifications".<sup>55</sup> Therefore, the Constitutional Court's judges are nominated by the Bundestag and Bundesrat (the legislature) because Germany practices the federal parliamentary democracy and is appointed by the Federal President.<sup>56</sup>

<sup>49</sup> BBC News. (Accessed on 5 Oct 2020).

Retrieved from [www.bbc.co.uk](http://www.bbc.co.uk).

<sup>50</sup> Rudolf Streinz. (2014). p.103.

<sup>51</sup> Katalin Kelemen. (2013). p.6.

<sup>52</sup> Katalin Kelemen. (2013). p.9.

<sup>53</sup> According to Katalin Kelemen, there are three models of appointment such as the split, the collaborative, and the parliamentary.

<sup>54</sup> James Madison. (1788) Federalist no.47, the Particular Structure of the new Government and the Distribution of Powers Among Its Different Parts, *The New York Packet*.

Retrieved from <https://guides.loc.gov/federalist-papers/text-41-50>.

<sup>55</sup> Recruitment, Professional Evaluation and Career of Judges and prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands, and Spain. (2005). ed, Giuseppe Di Federico, Bologna, Italy. No page number, I just referred to the quote of the author and it is the page before the preface.)

<sup>56</sup> Article 5 and 10, the Act on the Federal Constitutional Court, 1951.



German notions are based on John Locke's theory of division the sovereignty between the legislature and executive and the federative; not absolutely shared to the judiciary. It is corresponding to the France founding father of separation of powers, Montesquieu. The scholars explored and focused on the three prime branches should not interfere with each other and they should not take a seat more than one branch. It means that they did not express the separate functions and responsibilities of the judiciary to appoint and select their members themselves to the highest courts independently. On the other hand, some legal scholars proved that there is no absolute separation among the three great branches; they seem especially meant for the judiciary than the others. Thus, it can be said that the legislature and executive are political institutions because of their existence before they can form a government always are political parties. For the judiciary, judges those who appointed as justices of the Highest or Constitutional Court are also the judges who came from the different layers of subordinate courts, prosecutors, and judicial officers and law professors from a University serving their occupations. As a result, the role of the judiciary usually stands for legal justice and the rest: the legislature and executive naturally represent political justice. As far as I understand based on the knowledge, I have accumulated all my life, this is the possible reasoning of the reason that the judiciary is always behind the other branches in the hierarchy and it can also lead to the lack of complete separation of powers for the judiciary to get participation in selecting judges for the members of the FCC

in most of the countries and Germany. In conclusion, the federal-state' powers in Germany between the legislature, executive, and judiciary are deemed to be lack sharing. Hence, some legal and political scholars criticized that Germany accepts the cooperation of powers only.

### 1.3 Analysis of the Theoretical Independence of the Judiciary

Judicial independence in Germany is guaranteed in the chapter of the Judiciary like judges shall be independent and subject only to the law; judges shall not be dismissed, suspended, or transferred involuntarily; they cannot be forced retire before the expire of their official term of office only by the cause of a judicial decision and by the laws. On the other hand, judges may be transferred from one court to another court and removed from the office with the full salary if the court structure is changed.<sup>57</sup> Consequently, the impeachment procedure is prescribed for the federal judges.<sup>58</sup> Nevertheless, the majority vote is called for the commitment of the impeachment procedure.

On the other hand, judicial independence can be understood as part of a scheme of a separated power that guarantees the rule of law.<sup>59</sup> Judicial independence also can become up with a term of the freedom of the individual judges from fear, coercion, reward, or any other undue influence that might interfere with the judges' actions.<sup>60</sup> Many European countries have given judges a greater role in the administration of the court system and its resourcing. Judicial independence and judicial self-government

<sup>57</sup> Article 97 (1) and (2), the Basic Law for the Federal Republic of Germany, 1949.

<sup>58</sup> Article 98 (1 to 5), *Ibidem*.

<sup>59</sup> International IDEA. (2017). *Judicial Appointments*. 2<sup>nd</sup> edition, Stockholm, Sweden. (Accessed on 3 Nov 2020). Retrieved from <http://www.idea.int>

<sup>60</sup> International IDEA. (2017).

are often connected. European Judges Charter provides that “the administration of the judiciary must be carried out by the judges and independent of any other authority.”<sup>61</sup> The degree of judicial independence will tend to be greater where judges hold the majority of seats and are directly elected by the judiciary.<sup>62</sup> Similarly, the guarantee of judicial independence would be far-reaching if the higher judicial councils were entrusted with enough authority.<sup>63</sup> Independence of the judiciary is one of the foundations of the rule of law.<sup>64</sup> The standard of judicial independence should be measured with the International Convention of the Universal Declaration of Human Rights (hereinafter; UDHR) that is the first and central one to protect the fundamental freedoms of human beings in the civilization age. In Europe, the European Convention on Human Rights is also based on the UDHR and it is the most reliable law for the protection of people in Europe. The distinguished thing to point out from the Convention regarding the independence of the judiciary is that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>65</sup> Here, the term independent and impartial tribunal can be defined finally as the Supreme Court or Constitutional Court of a State as that kind of court has jurisdiction of hearing the cases of constitutional complaint that are arisen

because of the violation of constitutional rights by a public authority or organization including the ordinary courts.

## 2. Conclusion

In summary, related to the degree of the independence of the judiciary in the composition of the German Federal Constitutional Court, the appointment procedure is distinguished to show there is no transparency and expressly consistent to the international standard of judicial appointment recommended in the basic principles of the United Nations and the Universal Declaration on the Independence of Justice (Montreal Declaration). According to Ginsburg, “Appointment mechanisms are designed to insulate judges from short-term political pressures yet ensure some accountability.”<sup>66</sup>In additions, the study of the International IDEA, the appointment process should include (1) the independence of the judiciary from the legislature and executive, (2) securing the representativeness and inclusiveness of the judiciary especially about gender, status, ethnicity or origin and (3) judges should be qualified.<sup>67</sup> Regarding point(2), justice Susanne Bear became a judge of the First Senate and it is also uniformed with the United Nations basic principle on the

<sup>61</sup> John Bell. (2006). *Judiciaries within Europe: A comparative Review*, Cambridge University Press, Cambridge, UK. P-22.

<sup>62</sup> Carlo Guarnieri. (2006). *Appointment and career of judges in continental Europe: the rise of judicial self-government*. p.176.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Judges Charter in Europe* (European Association of Judges), 1997.

Retrieved from [www.icj.org](http://www.icj.org).

<sup>65</sup> Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol 9(3), P 3 (Pp 1-21). (Accessed on 26 Oct 2020) Retrieved from [www.researchgate.net/publication/330224643/A-Met](http://www.researchgate.net/publication/330224643/A-Met).

<sup>66</sup> International IDEA. (2017).

Retrieved from <https://www.idea.int/sites/default/files/...PDF> file.

<sup>67</sup> *Ibidem* p-3.

independence of the judiciary.<sup>68</sup> She is the first lesbian to work on the FCC. Also, she is a Professor of Public Law and gender studies with the faculty of law at Humboldt University of Berlin.<sup>69</sup> She is one of the judges who prohibit wearing the headscarves in the German classrooms expressing religious belief by outer appearance is not consistent with their freedom of faith and their freedom to profess belief.<sup>70</sup> Furthermore, judicial independence requires that a legal system protect its judges from governmental, business, personal, or social pressures that could force a judge to deviate from her interpretation and application of the law.<sup>71</sup> This indication is related to the competencies of the Court and its independence of applying them to that of the appointment procedure.

The funding of the Constitutional Court is independent significantly as the Plenary of the Court has the power to submit the budget annually and the FCC has organizational autonomy. Furthermore, the term and tenure of the judges are twelve years, and it remains stable. There are no noted cases related to the violation of the norms of judicial independence at the international level and the European extent. In my opinion, the FCC is well-known not because of the federal composition of the Court with the absence of sharing the equal power to the judiciary, but because of the prominent competencies; the technical solutions to protect human dignity all its best by lively interpreting the Basic Law.

### References:

- Christine Landfried. (1985). *The Impact of the German Federal Constitutional Court on Politics and Policy Output*, Cambridge University Press.
- Carlo Guarnieri. (2006). *Appointment and career of judges in continental Europe: the rise of judicial self-government*.
- Constitutional Law of 15 EU Member States. (2004). Lucas Prakke, Constantijn Kortmann (Eds), Kluwer, Deventer.
- Dieter Grimm. (2017). *Federal Constitutional Court of Germany (Bundesverfassungsgericht)*, Oxford University Press (2020).
- Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol 9(3).
- Fiona O' Connel & Ray McCaffrey. (2012). *Judicial Appointments in Germany and the United States*, Research and Information Service Research Paper, Northern Ireland Assembly.
- Georg Vanberg. (2000). Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of powers, *Comparative Politics*, Vol 32(3).
- Dr. Gotthard Wohrmann. (2001). *The Federal Constitutional Court: an Introduction*.
- Hans-Ernst Bottcher. (2004). The Role of the Judiciary in Germany. *German Law Journal*, Vol 5, No 10.
- Hans G. Rupp. (1969). The Federal Constitutional Court in Germany: Scope of its jurisdiction and procedure. *Notre Dame Law Review*, Volume 44:4(3).

<sup>68</sup> Principle 10, Basic Principle of the Independence of Judiciary, 1985. (Accessed on 6 Nov 2020). Retrieved from <https://www.ohchr.org/EN>.

<sup>69</sup> Michael Wrase (2019). Gender Equality in German Constitutional Law, Discussion paper, WZB Berlin Social Science Center, Berlin, Germany. P-9. (Accessed on 3 Nov 2020). Retrieved from [www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf](http://www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf).

<sup>70</sup> 1 BvR 47/10, /BvR 1181/10.

<sup>71</sup> *Ibidem* p.-6.

- Jean-Michel Hauteville. (2018). Why even Germany's Federal Constitutional Court has a political problem.
- John. Bell. (2006). *Judiciaries within Europe*, Cambridge University Press. P-5. (This book is downloaded from the John Bell Online Library).
- James Madison. (1788) Federalist No.47, the Particular Structure of the new Government and the Distribution of Powers Among Its Different Parts, *The New York Packet*.
- Jenny Gesley. (2016). How Judges are selected in Germany.
- Konrad Adenauer Stiftung. (2020). Landmark Decision of the Federal Constitutional Court in the Area of Fundamental Rights.
- Martin Heidebach. (2014). The election of the German Federal Constitutional Court's judges – A lack of Democracy? *Ritsumeikan Law Review*, No.31.
- Michael Wrase (2019). Gender Equality in German Constitutional Law, Discussion paper, WZB Berlin Social Science Center, Berlin, Germany.
- Paul Bovend'Eert. (2018). Recruitment and Appointment of judges and justices in Europe and the US: Law and Legal Culture.
- Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, *Ritsumeikan Law Review*, No 31.
- Recruitment, Professional Evaluation and Career of Judges and prosecutors in Europe: Austria, Frances, Germany, Italy, The Netherlands, and Spain. (2005). ed, Giuseppe Di Federico, Bologna, Italy.
- Prof.Dr.Jur. Thomas Henne. (2019). The History and Structure of German Basic Law- The Fundamental Structural Principles of the Federal Republic of German. Introduction to German basic Law Lectures (6-10/5/2019), University of Debrecen, Faculty of Law.
- International IDEA. (2017). *Judicial Appointments*. 2<sup>nd</sup> edition, Stockholm, Sweden.
- United States Institute Peace. (2009). *Judicial appointment and Judicial Independence*.
- [https:// www.ohchr.org/EN](https://www.ohchr.org/EN).
- <http://www.idea.int>
- [www.researchgate.net](http://www.researchgate.net)
- <https://guides.loc.gov/federalist-papers/text>
- [www.akjournals.com](http://www.akjournals.com)
- [www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/](http://www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/)
- <https://www.jstor.org>.
- [www.niassembly.gov.uk/.../](http://www.niassembly.gov.uk/.../)
- <https://www.iuscomp.org>.
- [www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf](http://www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf).
- <https://oxwn.ouplaw.comlaw.com>.
- [www.handelsblatt.com/English/politics/handelsblat](http://www.handelsblatt.com/English/politics/handelsblat).
- [www.nvvr.org](http://www.nvvr.org).
- [www.usip.org](http://www.usip.org).
- [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).
- <http://scholarship.law.nd.edu/ndlr/vol44/iss4/3>
- <https://www.britannica.com>.
- [www.bmi.bund.de/download/publikationen/federal-public-service.pdf](http://www.bmi.bund.de/download/publikationen/federal-public-service.pdf).
- <https://www.history.com>.
- from [www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf](http://www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf).
- [www.icj.org](http://www.icj.org).
- [www.bbc.co.uk](http://www.bbc.co.uk).