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A Taxonomy on Constitutional Court Appointment Mechanisms in Federal Countries

MOLLY MADDEN*

INTRODUCTION

A federal country is a union of partially self-governing regions, whether those regions are provinces or states, where the regions are unified under a central federal government; there are between twenty-five and thirty-three federal countries in the world.¹ The division of power between the regions and the central government is often delineated in a country's constitution and varies from country to country. Countries differ in how they decide federal disputes meaning questions about the country's fundamental federative structure, such as sharing legislative powers, the constitutional amendment procedure, the legal status of the federal and state entities, or the territory of a federated entity and its authority to secede.² These issues are often decided by Constitutional or Supreme Courts. The amount of state input in the appointment of judges to these courts varies.

This paper provides a taxonomy of how federal countries appoint judges to their highest courts. Appointment mechanisms involve (1) little or no meaningful input from state government, (2) the states acting in an indirect role, or (3) substantial state government input. Within-group

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¹ Cheryl Saunders, CONSTITUTIONAL BRIEF: COURTS IN FEDERAL COUNTRIES 1 (Int'l Inst. for Democracy and Electoral Assistance 2019); Note: some countries were excluded from this taxonomy due to a lack of information about their courts. Suriname, for example, has provisions in its constitution for a Constitutional Court in Article 144, but such a court was not established until 2020. See Ivan Cairo, *Rule of law only guideline Constitutional Court*, May 8, 2020, <http://dwtonline.com/laatste-nieuws/2020/05/08/rechtsstatelijkheid-enige-leidraad-constitutioneel-hof>; Ivan Cairo, *Blunders of the Constitutional Court's Lectures are Being Corrected*, Jan. 1, 2020, <http://www.dwtonline.com/laatste-nieuws/2020/01/19/blunders-voordrachten-constitutioneel-hof-woorden-gecorrigeerd>.

² Eugenie Brouillet, *The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effect on the Balance of Power in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 135 n. 1 (Nicholas Aroney & John Kincaid eds., 2017).

one, countries that allow for little to no meaningful input from state governments, some countries require that one federal body check another federal body during the appointment process, such as the federal executive's nominees are confirmed by the federal senate. I first evaluate which court or entity in each country answers federalism questions, whether that is a Constitutional Court, Supreme Court, or a commission. I then look at how members of that body are appointed and evaluate that procedure for level of state input.

I. COUNTRIES WITHOUT MEANINGFUL STATE INPUT IN THE APPOINTMENT PROCESS

The majority of countries do not allow the states or provinces substantial input into the appointment process for selecting judges onto their highest courts. A lack of substantial input from the states is defined by the federal government playing the primary role in appointment mechanisms. Representatives from a few states may be consulted, but that consultation is not a requirement, or a federal officer or body may appoint judges without any input from the states. Many countries require that one federal body gain approval from another federal body before appointments are made; however, the state governments are not involved in this process. Countries in this category include: Argentina, Australia, Brazil, Canada, Comoros, Ecuador, India, Malaysia, Mexico, Serbia, South Africa, Spain, Switzerland, United States of America, and Venezuela.

A. *Argentina*

Argentina is a federal country that has been defined by a very strong federal or central government.³ The National Supreme Court of Justice decides issues of federalism in Argentina.⁴ Under the Constitution of Argentina, the President of the Nation appoints Supreme Court judges,

³ Antonio M. Hernandez, *Republic of Argentina in 3 A GLOBAL DIALOGUE ON FEDERALISM: LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES* 9 (Katy Le Roy & Cheryl Saunders eds., 2006).

⁴ *Id.* at 20.

with the consent of the Senate with two-thirds of its members present, in a public session convened for that purpose.⁵ The appointment process for lower federal judges was amended through the National Territory Act to increase the independence of the judiciary; however, the establishment of the Council of the Magistracy did not change the appointment procedures for the National Supreme Court of Justice.⁶ The judiciary is largely viewed as controlled by the office of the President. The President has been able to control the composition of the Supreme Court.⁷ The governments of the states or regions of Argentina have no role in this appointment process.

B. Australia

In Australia, one federal government agent ultimately controls the appointment process. The High Court of Australia settles federal disputes.⁸ The several justices of the High Court are appointed by the Queen's representative, the Governor-General,⁹ who is appointed by the Queen from the prime minister's recommendation.¹⁰ The Governor-General must consult members of the federal government before appointments are made, specifically, the Federal Attorney-General.¹¹ The Federal Attorney-General is viewed as the true decision-maker in appointments.¹² The High Court of Australia Act 1979 requires that the Federal Attorney-General consults with the State Attorneys-General; however, only the consultation is required. The Commonwealth or Federal Attorney-General is not required to seek the approval of the State Attorneys-General.¹³

⁵ Art. 99, CONSTITUCIÓN NACIONAL [CONST. NAC] (Arg.).

⁶ Hernandez, *supra* note 3, at 20.

⁷ Hernandez, *supra* note 3, at 21.

⁸ Nicholas Aroney, *The High Court of Australia: Textual Unitarism vs Structural Federalism in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 43 (Nicholas Aroney & John Kincaid eds., 2017); *see also* HIGH COURT OF AUSTRALIA, <https://www.hcourt.gov.au/about/operation> (last visited Jan. 18, 2020).

⁹ *Australian Constitution* s 72.

¹⁰ *Id.* at s 2.

¹¹ *High Court of Australia Act 1979* (Cwlth) s 6.

¹² MAX SPRY, EXECUTIVE AND HIGH COURT APPOINTMENTS 15 (Department of the Parliamentary Library, 2000).

¹³ *High Court of Australia Act*, *supra* note 12.

Additionally, the Commonwealth Attorney-General consults with many other members of the government and legal profession.¹⁴ Thus, the states do not have a large role in this process. Consultation with the states' representatives allows them a minimal voice especially considering that their approval is not necessary.

C. Brazil

In Brazil, the federal government has total control over the appointment process, but one federal body has to approve the federal executive appointees. The Supreme Federal Tribunal addresses federal disputes in Brazil.¹⁵ Ministers of the Supreme Federal Tribunal are appointed by the President of the Republic, with approval of an absolute majority of the Federal Senate.¹⁶ The 81-seat Federal Senate is composed of three representatives from each state and the Federal District. These representatives are directly elected by their constituents.¹⁷ Thus, the President nominates but cannot appoint without approval from the Senate. This does not allow for any meaningful input from state governments.

D. Canada

The Canadian appointment process is very similar to that of Australia and similarly provides minimal state representation and input. The Supreme Court of Canada decides issues of federalism.¹⁸ The federal government, through the Governor in Council, appoints all the judges of the Supreme Court, and the Governor in Council is not required to consult or seek the approval of the provinces.¹⁹ There is a requirement that three judges be from Quebec,²⁰ which

¹⁴ SPRY, *supra* note 13, at 15.

¹⁵ Gilberto Marcos Antonio Rodrigues ET AL., *The Supreme Federal Court of Brazil: Protecting Democracy and Centralized Power in* COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? 116 (Nicholas Aroney & John Kincaid eds., 2017).

¹⁶ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 101 (Braz.).

¹⁷ Rodrigues, *supra* note 16, at 113.

¹⁸ Brouillet, *supra* note 2, at 148.

¹⁹ *Supreme Court Act*, R.S.C. 1985, c. S-26, s 4(2).

²⁰ *Supreme Court Act*, R.S.C. 1985, c S-26, s 6.

provides minimal provincial representation. However, this level of representation does not rise put Canada into the indirect role or high input categories.

E. Comoros

Other countries appear to allow states to have input into the appointment of justices or judges onto their highest courts, but in practice the central or federal government holds the power. Comoros provides an example of this. The Constitutional Court of Comoros decides federal disputes.²¹ According to the Comoros Constitution, “The President of the Union, the Vice Presidents of the Union, the President of the Assembly of the Union, and the heads of the island executives shall each appoint one member to the Constitutional Court.”²² This appointment mechanism suggests that the heads of the three islands (the states essentially) can control membership to this court. However, the president has the ability to suspend this court entirely from operation, so any input from the states is not meaningful. In a 2018 referendum, for example, the president abolished the Constitutional Court, and transferred its competencies to a new chamber of the Supreme Court without any input from the state.²³ Thus, Comoros on paper allows for state input, but its corrupt government and other structural features do not allow the states to have meaningful input through representation on the Constitutional Court to settle federal disputes.

F. Ecuador

Ecuador is a federal country that has experienced tremendous change in its judiciary over the past 15 years. As created by the 2008 Constitution, the Constitutional Court appears to

²¹ Comoros Const. 2001. Revised 2009. art. 36.

²² *Id.*

²³ AFP, *Comoros President Suspends Constitutional Court*, The Independent, April 19, 2018; <https://www.independent.co.ug/comoros-president-suspends-constitutional-court/>.

answer questions of federalism, but the Court is still relatively new.²⁴ The first Court took office in November 2012 after an interim court presided from 2008–2012.²⁵ The Court has nine members that hold office for nine years.²⁶ The justices of the Court are elected from candidates submitted “by a qualification commission comprised of two persons appointed by each of the following branches of government: the legislative, the executive, and transparency and social monitoring.”²⁷ The justices are elected “through a public examination process, with citizen oversight and option for challenging the process.”²⁸ Three of the nine justices have to be replaced every three years. The Court has already been criticized for being aligned politically with the President.

This process seemingly allows for no meaningful input from state governments. The federal National Assembly is a unicameral body that is directly elected, and the transparency and social monitoring body, The Council of Citizen Participation and Social Control, does not have any members from state government. For example, the Transitional Council of Citizen Participation and Social control was made up of seven councilors, whom were elected by the Legislative Power between a list of candidates proposed by the President.²⁹ The only potential state-input would be through the executive branch of government, which consists of the president, the vice president, the ministers of state and their subordinate officials, and Conade, but the President appears to dominate this process.

²⁴ ECUADOR: CONSTITUTION [ECUADOR], 2008, art. 436.

²⁵ Jose Luis Castro-Montero and Gijs van Dijck, *Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)*, 380–98, Jun 2, 2017.

²⁶ ECUADOR: CONSTITUTION [ECUADOR], 2008, art. 432.

²⁷ ECUADOR: CONSTITUTION [ECUADOR], 2008, art. 434.

²⁸ ECUADOR: CONSTITUTION [ECUADOR], 2008, art. 434.

²⁹ 2018 Transitional Council of Citizen Participation and Social Control, General Coordination of International Relations, (2018); <http://www.cpeccs.gob.ec/wp-content/uploads/2018/10/PRESENTACION-1.pdf>.

G. India

Other courts are even farther removed from provincial influence. In India for example, many argue that the Supreme Court has become self-appointing.³⁰ The president of India appoints the Supreme Court justices after consulting with the Supreme Court's justices and the high courts that sit on the National Judicial Appointments Commission (NJAC). The Supreme Court of India settles federal disputes; it is the highest court in India and final arbiter even though High Courts can answer constitutional questions as well.³¹

Justices of the Supreme Court are appointed by the president of India after the president consults with justices of the Supreme Court and the high courts that sit on the National Judicial Appointments Commission (NJAC).³² According to the India Constitution, the NJAC is meant to be comprised of the Chief Justice of India; two other senior Judges of the Supreme Court; the Union Minister in charge of Law and Justice; and two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People.³³ However, the Supreme Court ruled that the president cannot appoint judges to the Supreme Court unless the appointee conforms to the "collective recommendation" of the chief justice of India and four of his senior-most colleagues.³⁴ Thus, the members of the Supreme Court have the greatest weight in this appointment process, and whether the president appoints the member or the members appoint future members, the states are not given any meaningful input.

³⁰ Manish Tewari & Rekha Saxena, *The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 241 (Nicholas Aroney & John Kincaid eds., 2017).

³¹ *Id.* at 240.

³² INDIA CONST. art. 124, § 2.

³³ INDIA CONST. art. 124A.

³⁴ *Supreme Court Advocates on Record Association v. Union of India*, 1993 (4) SCC 441; A.I.R. 1994 SC 268.

H. Malaysia

Malaysia's appointment system is centralized on the federal executive; although, it does allow for a small amount of state input. Formal approval or confirmation by state actors is not needed, however, which is why Malaysia is not in the category in which states play an indirect role.

Malaysia's Supreme Court, the Federal Court, decides disputes about federalism.³⁵ The Federal Court is comprised of a Chief Justice, the President of the Court of Appeal, the Chief Judges of the High Courts, and four to eleven other judges.³⁶ This structure allows for some provincial input in that there are two High Courts that serve different geographical areas; the High Court of Malaya for the states of Peninsular Malaysia and the High Court of Sabah and Sarawak for the Borneo states.³⁷ Each High Court has a Chief Judge, and the independence of the High Court of Sabah and Sarawak is of particular importance to the identity of the Borneo states.³⁸

The Yang di-Pertuan Agong or King appoints members of the Federal Court. The King acts on the advice of the Prime Minister, after consulting the Conference of Rulers, when appointing the Chief Justice and other members of the Court.³⁹ Before the Prime Minister gives the King advice on whom to appoint as members of the Court, he or she consults with the Chief Justice of the Federal Court. The Conference of Rulers is made up of nine rulers of the Malay states, and the governors of the other four states.⁴⁰ Thus, the states have minimal input into the

³⁵ CONSTITUTION OF MALAYSIA (1957, rev. 2007), art. 128.

³⁶ *Id.* at art. 122.

³⁷ Yvonne Tew, *The Malaysian Legal System: A Tale of Two Courts*, Georgetown University Law Center 1, 4 (2011).

³⁸ *Id.*

³⁹ CONSTITUTION OF MALAYSIA, *supra* note 37, at art. 122b.

⁴⁰ CONSTITUTION OF MALAYSIA (1957, rev. 2007), *Id.* at art. 38.

appointment process through the Conference of Rulers. The Conference of Rulers does not have to approve appointees. Overall, the combination of High Court Chief Judges and consultation from the Conference of Rulers provides states with an opportunity to weigh in on the appointment of Justices to the Federal Court, but state governmental bodies do not have enough impact to put Malaysia into the categories in which state actors can directly or indirectly appoint justices.

I. Mexico

Mexico's appointment mechanisms allow the federal Senate to appoint members of the court from candidates chosen by the president; thus, one federal entity checks the power of the other. The Supreme Court of Justice decides issues of federalism in Mexico.⁴¹ The President submits a list of three candidates for Justices of the Supreme Court of Justice to the Senate, which is the federal legislature's upper house.⁴² The Senate then has the power to appoint Justices from that list or it can reject the list. If the Senate rejects the list of three, then the President must submit a new list.⁴³ This process allows for no input from the state government.

J. Pakistan

The appointment procedures in Pakistan involve one federal body checking the power of another federal body following consultation with a commission comprised of members and former members of the Supreme Court.

In Pakistan, the Supreme Court has original jurisdiction in any issue between the provincial governments or between the provincial governments and the federal government.⁴⁴

⁴¹ Constitución Política de los Estados Unidos Mexicanos, CP, art. 105, Diario Oficial de la Federación [DOF] 05-02-1917, 2015 (Mex.).

⁴² Constitución Política de los Estados Unidos Mexicanos, CP, art. 76, Diario Oficial de la Federación [DOF] 05-02-1917, 2015 (Mex.).

⁴³ *Id.* at art. 96.

⁴⁴ PAKISTAN CONST. art. 184, § 1.

The President appoints all Supreme Court judges following nomination from the Parliamentary Committee.⁴⁵ The Parliamentary Committee is comprised of four members of the Senate, the upper house of Majlis-e-Shoora (Parliament), and four members of the National Assembly, the lower house, for each vacant position on the Supreme Court that needs to be filled.⁴⁶ All members of Parliament are directly elected based on provincial jurisdictions.⁴⁷ Each Parliamentary Committee member is nominated by the Judicial Commission of Pakistan.⁴⁸ The Judicial Commission of Pakistan is made up of the Chief Justice of Pakistan (the most senior Judge of the Supreme Court); four most senior Judges of the Supreme Court; a former Chief Justice or a former Judge of the Supreme Court of Pakistan who is nominated by the Chief Justice of Pakistan; the Federal Minister for Law and Justice; the Attorney-General for Pakistan; and a Senior Advocate of the Supreme Court who is nominated by the Pakistan Bar Council.⁴⁹ Thus, the appointment process for members of the Supreme Court is entirely led by federal actors. The current and former members of the Court play a large role in this process. This process allows for three federal agencies to check each other, but it does not allow for any input from state government actors.

K. Serbia

Serbia's appointment mechanism allows one branch of the federal government to check the power of another branch, but it does not allow for any input from the state government. The Constitutional Court of Serbia decides federal disputes.⁵⁰ The Constitutional Court has fifteen

⁴⁵ *Id.* at art. 177.

⁴⁶ *Id.* at art. 175A, § 9.

⁴⁷ Senate of Pakistan, <http://www.senate.gov.pk/en/> (last visited Mar. 8, 2020); National Assembly of Pakistan, <http://www.na.gov.pk/en/content> (last visited Mar. 8, 2020).

⁴⁸ PAKISTAN CONST. art. 175A.

⁴⁹ PAKISTAN CONST. art. 175A.

⁵⁰ The Republic of Serbia, the Constitutional Court, <http://www.ustavni.sud.rs/page/view/> (last visited Jan. 17, 2020).

justices. Five justices are appointed by the National Assembly, which is the unicameral legislature of Serbia.⁵¹ The 250 seats of the National Assembly are filled through closed-party list, proportional voting where the whole country is one electoral district.⁵² However, the five justices appointed by the National Assembly must be among ten candidates proposed by the President.⁵³ The President appoints five additional justices, and the final five justices are appointed at the general session of the Supreme Court of Cassation.⁵⁴ The President of the Republic must appoint justices from among ten candidates proposed by the National Assembly.⁵⁵ The states do not have a large influence in this process, considering all of the justices are appointed by federal bodies.

L. South Africa

South Africa's central government holds the most power in the appointment of justices to its Constitutional Court. The South African Constitutional Court decides issues of federalism, specifically disputes between the central government and provinces.⁵⁶ The President of the Republic appoints the Chief Justice and the Deputy Chief Justice of the Constitutional Court after consultation with the Judicial Service Commission and the leaders of the political parties in the National Assembly.⁵⁷ The President also appoints the other nine judges on the Court after advisement from the Chief Justice and party leaders represented in the National Assembly. The President has to select the remaining nine judges from a list prepared by the Judicial Service

⁵¹ Serbia Const. 2006. art. 172.

⁵² National Assembly of the Republic of Serbia, <http://www.parlament.gov.rs/national-assembly/> (last visited Jan. 18, 2020).

⁵³ Serbia Const. 2006. art. 172.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Adem Kassie Abebe, *Umpiring Federalism in Africa: Institutional Mosaic and Innovations*, 13 *African Stud. Quarterly* 53, 64 (2013).

⁵⁷ S. AFR. CONST., 1996. Chapter 8. 174.

Commission, but he or she can determine that the list is unacceptable.⁵⁸ The states thus have a small amount of input through party leaders in the National Assembly. Still, this level of representation is not meaningful when the provinces are represented more fully through the Council of Provinces. The Council of Provinces has four permanent delegates in the Judicial Service Commission, which provides the list of nominees.⁵⁹ However, this level of input does not rise to the level of states playing an indirect role because it only represents the input of four provinces maximum. The central government appoints Constitutional Court Members without any formal, direct involvement from the provinces and with very little involvement from the Council of Provinces.

M. Spain

Spain's appointment mechanisms do not allow for meaningful state input. However, Spain's system requires that one federal body check another during the appointment process while also allowing nominations by a body outside the federal government.

The Constitutional Court of Spain answers questions of federalism.⁶⁰ The King ultimately appoints judges to the Constitutional Court after receiving nominations from four different groups. Of the twelve members of the Court, Congress nominates four judges by a three-fifths majority of its members, the Senate nominates four by a three-fifths majority, the General Council of the Judicial Power nominates two, and the Government nominates two.⁶¹ The "Government" refers to the Head of Government and Ministers. The Prime Minister appoints the Ministers.⁶²

⁵⁸ *Id.*

⁵⁹ Abebe, *supra* note 58, at 65.

⁶⁰ CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 123, Dec. 29, 1978 (Spain).

⁶¹ CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 159, Dec. 29, 1978 (Spain).

⁶² CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 112, Dec. 29, 1978 (Spain).

All members of Congress are directly elected. There are two seats in Congress for each province, and the remaining seats are distributed in proportion to the respective population.⁶³ Every province directly elects four members of the Senate.⁶⁴ Thus, there is no state government representation in this appointment process through the Congress or Senate.

The General Council of the Judiciary is an autonomous body composed of judges and other jurists, who exercise government functions within the Judiciary to guarantee the independence of the judges.⁶⁵ Of the twelve General Council members who must be judges or magistrates, Congress elects six and the Senate elects six from a list of thirty-six candidates proposed by associations of judges or by non-associate judges.⁶⁶ Of the eight members who must be lawyers or jurists, four of them are elected by the Congress and four by the Senate. This appointment process allows one branch of the federal government to check another and allows independent stakeholders outside of the federal government to nominate two members. Yet, the states still have no meaningful role in selecting judges for the Constitutional Court.

N. Switzerland

There is no meaningful input from state governments in the appointment of Federal Supreme Court Judges in Switzerland. Switzerland is a federal country comprised of twenty-six cantons and over two thousand municipalities.⁶⁷ The Federal Supreme Court is the highest court in the country and decides questions of federalism.⁶⁸ However, the Federal Supreme Court is

⁶³ Congress, <http://www.congreso.es/portal/page/portal/Congreso/> (last visited Jan. 19, 2020); Senado de España, <http://www.senado.es/web/conocersenado/temasclave/> (last visited Jan. 19, 2020).

⁶⁴ Congress, <http://www.congreso.es/portal/page/portal/Congreso/> (last visited Jan. 19, 2020).

⁶⁵ General Council of the Judiciary, http://noticias.juridicas.com/base_datos/Admin/lo2-2001.html (last visited Jan. 19, 2020).

⁶⁶ *Id.*

⁶⁷ Andreas Lienhard et al., *The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 404 (Nicholas Aroney & John Kincaid eds., 2017); BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 1999, SR art. 1, 53 (Switz.).

⁶⁸ BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 1999, SR art. 189, para 2 (Switz.).

unusual in that it does not have judicial review of the constitutionality of federal laws. It settles disputes between the confederation and cantons or between cantons.⁶⁹ Thus, if a federal law violates the principles of federalism, the court must still apply it.⁷⁰ The Federal Assembly, the federal parliament, appoints all Federal Supreme Court Judges.⁷¹ These appointments consider "linguistic, regional and technical criteria and voluntarily takes account of the proportional representation claims of the major political parties," yet the judges are generally perceived as independent.⁷² Judges on the Federal Supreme Court only serve six-year terms.⁷³ All members of both houses of the bicameral Federal Assembly are directly elected by geographic region; thus, the canton governments have no say in the appointment process.

O. United States of America

The United States' system is very similar to that of Argentina and Brazil. The Supreme Court of the United States decides questions of federalism.⁷⁴ Supreme Court Justices are nominated by the President and confirmed by the Senate. There must be a simple majority in favor of the candidate in the Senate.⁷⁵ Each state is represented by two individuals in the Senate.⁷⁶ The President cannot appoint a justice to the Supreme Court without Senate approval, but state governments are not involved in any part of this process.

⁶⁹ Andreas Lienhard et al., *The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 416 - 417 (Nicholas Aroney & John Kincaid eds., 2017); BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 1999, SR art. 190 (Switz.).

⁷⁰ *Id.* at 420.

⁷¹ *Id.* at 417.

⁷² The Courts of Switzerland, <https://www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm> (last visited Jan. 1, 2021).

⁷³ BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 1999, SR art. 145 (Switz.).

⁷⁴ U.S. CONST. art. III, § 2, cl. 1.

⁷⁵ U.S. CONST. amend. XVII, cl. 2.

⁷⁶ U.S. CONST. art. I, § 3, cl. 1.

P. Venezuela

The last country addressed in this category, Venezuela, provides an example of how one branch of the federal government can gain control over the judiciary and questions of federalism. The Venezuelan judiciary has been in flux over the past few years. The current top court is unclear. However, it is clear that the President has been able to use the court for his personal gain, and the courts have largely been viewed as an arm of the executive branch.

The current Constitution of Venezuela has not been able to guard against the executive takeover of the judiciary. According to the 1999, 2009 Revised Constitution, the Supreme Tribunal of Justice is the highest court. It has thirty-two justices (“magistrados”) that the National Assembly elects for a single twelve-year term.⁷⁷ The National Assembly is one of two law-making bodies in Venezuela, though its power has waned over time. Each state directly votes for at least three representatives in the National Assembly.⁷⁸ The National Assembly appoints justices to the Supreme Tribunal of Justice following recommendations from the Committee for Judicial Postulations.⁷⁹ The Committee for Judicial Postulations gathers information on potential candidates by meeting with organizations that focus on legal issues and prioritize citizen power.⁸⁰ On paper, the National Assembly provides input into judicial appointment, which spreads the power of appointment across two federal bodies. In reality, however, the executive branch has been able to use the judiciary to its advantage.⁸¹ Regardless, state governments have no impact on the appointment process.

⁷⁷ Venezuela Const. 1999. Revised 2009. art. 264; Antonio Ramirez, *An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources* (May 2006), <https://www.nyulawglobal.org/globalex/Venezuela.html>.

⁷⁸ Venezuela Const. 1999. Revised 2009. art. 186.

⁷⁹ Antonio Ramirez, *An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources* (May 2006), <https://www.nyulawglobal.org/globalex/Venezuela.html>.

⁸⁰ *Id.*

⁸¹ David Smilde, Venezuela’s Other Crisis: A Justice System Dismantled from Within, *World Politics Review*, Feb. 10, 2015.

Countries in which states are perceived to have little or no power in the appointment of members to the highest courts on questions of federalism are those in which the state legislatures or state governments play no role or a very minor role in these processes. Countries in which state governments play a minor role include Canada, Comoros, Malaysia, and South Africa. The countries in this section are characterized by strong federal or central governments, and some are characterized by judiciaries that lack independence.

II. COUNTRIES IN WHICH STATE GOVERNMENT PLAYS AN INDIRECT ROLE

The second group of countries is the one in which state governmental approval or input is required. State governments, through representatives on federal bodies, have to select the candidates for federal executive approval or approve the federal executive's appointees, thus acting indirectly. This system provides states with meaningful input, but that input is not as strong as the input from the states in group three, because the states' representatives are not directly placing individuals onto the courts. These countries include: Austria, Belgium, the Republic of Congo, Nigeria, Russia, and the United Arab Emirates.

A. *Austria*

The Constitutional Court of Austria decides questions of federalism.⁸² The Constitutional Court consists of a president, a vice-president, and twelve other members, as well as six substitute members. Members and substitute members are appointed by the Federal President, who is directly elected.⁸³ The Federal Government can make proposals for the position of President and Vice-President.⁸⁴ The six remaining members and three substitute members of the

⁸² Johannes Oehlboeck & Immanuel Gerstner, *The Austrian Legal System and Laws: a Brief Overview*, <https://www.nyulawglobal.org/globalex/> (last visited Jan. 19, 2020).

⁸³ Bundes-Verfassungsgesetz [B-VG][Constitution] 2013, art. 147, ¶¶ 1–2.

⁸⁴ Constitutional Judges: Overview, <https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/> (last visited Jan. 19, 2020).

Court are nominated partly by the National Council and partly by the Federal Council.⁸⁵ The National Council is the lower house of parliament, and members of the National Council are elected through forty-three local electoral districts.⁸⁶ Political parties submit separate ranked lists of candidates for each regional or local district where they have chosen to run. They also submit a federal-level list.

The Federal Council is the upper house of the Austrian Parliament, representing the nine Austrian states on a federal level.⁸⁷ The Provincial Diets of the nine Federal Provinces delegate members to the Federal Council to represent the interests of their provinces in the federal legislative process. Thus, the Federal Council is the mouthpiece for the states in the appointment process. The Federal President has the final say on who becomes a member of the Constitutional Court, but there is still meaningful input from the states in this capacity.

B. Belgium

Belgium is a federal country made up of three communities and three regions that are based on linguistic differences.⁸⁸ The Constitutional Court decides questions of federalism⁸⁹ and has been described as "an important safeguard for the autonomy of the federated entities."⁹⁰ There are twelve judges total on the Court, but it generally hears cases by a panel consisting of the two Presidents, one Dutch-speaking and one French-speaking, and five judges.⁹¹ At the

⁸⁵ *Id.*

⁸⁶ Republic of Austria Parliament, <https://www.parlament.gv.at/ENGL/PERK/NRBRBV/NR/> (last visited Jan. 17, 2020).

⁸⁷ *Id.*

⁸⁸ Patrick Peters and Jen Mosselmanns, *The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 69 (Nicholas Aroney & John Kincaid eds., 2017).

⁸⁹ 1994 CONST. art. 142 (Belg.).

⁹⁰ Peters and Mosselmanns, *supra* note at 69.

⁹¹ *Id.* at 79.

beginning of each annual session, the Presidents create a list to make the panel. The appointment process allows for the states to play a significant indirect role.

The King appoints judges of the Court for life after nomination from lists of two candidates submitted alternatively by the Senate and the House of Representatives.⁹² The lists have to be passed by a two-thirds majority in each house. Six judges must speak Dutch, and six must speak French. One of the judges must have adequate knowledge of German, and each language group elects its President. Thus, the judges are selected, in part, to reflect the range of political views in the federal Parliament.⁹³

The Chamber of Representatives does not provide for any state input into the appointment process because its members are directly elected. The Senate creates an indirect way for state governments to have significant input into the appointment process. There are fifty “substate senators” who are members of a substate parliament and of the Senate and ten “co-opted senators” who are appointed by substate senators. As of May 25, 2014, for example, the Senate had one senator who was appointed by the Parliament of the German-speaking community, two who were appointed by the French-speaking group of the Brussels-Capital Parliament, eight who were appointed by the Walloon Parliament, ten appointed by the Parliament of the French Community, and twenty-nine who were appointed by the Flemish Parliament.⁹⁴ While the Belgium Senate is similar to the German Bundesrat, Belgium's appointment process still requires the King's final approval, and so the states are not directly appointing judges. However, since the Senate is a direct mouthpiece for the states and the Senate creates their own list of nominees, the states play a larger role in Belgium than in the Congo.

⁹² *Id.* at 85.

⁹³ *Id.*

⁹⁴ Assembly of the Regions and Communities, *The Senate 2014 to 2019*, https://www.senate.be/english/Brochure-2014-2019_EN.pdf.

C. *The Republic of Congo*

The Republic of the Congo (Congo) is a federal country in which the Constitutional Court decides issues of federalism.⁹⁵ The state governments play a small, indirect role in appointing the judges of the Court through their election of members of a federal body. The Constitutional Court is comprised of nine judges. The President appoints three judges without any formal recommendations required, three judges that are nominated by the Senate and National Assembly, and three judges that are nominated by the Judicial Service Council (JSC).⁹⁶

The JSC is comprised of public prosecutors and judicial officers, representing all the court levels, which provides for some input from the states but no meaningful input from state governments. The National Assembly is directly elected, which does not create an avenue for state input. However, the 108 members of the Senate are elected by provincial assembly members, which are members of the state legislatures. Thus, state government is represented in this appointment process by the Senate. Because state government actors do not actually serve in the federal legislature, the Congo is more like Austria than Germany. The state governments choose who will serve in the Senate.

The role of state government is not large here; the Senate and National Assembly nominate only three judges for the Court, and they vote as one body for this process. Further, the president has final say, but the state legislatures do have an avenue for influencing this process. The first

⁹⁵ Dunia Zongwe, et al., *Update: Overview of the Legal System of the Democratic Republic of the Congo (DRC) and Research*, Hauser Global Law School Program, https://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html#_The_Constitutional_Court.

⁹⁶ Dunia Zongwe, et al., *Update: Overview of the Legal System of the Democratic Republic of the Congo (DRC) and Research*, Hauser Global Law School Program, https://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html#_The_Constitutional_Court.

Constitutional Court appointed under this structure took office in July 2014; thus, this structure is relatively new and could change over time.

D. Nigeria

Nigeria's large Supreme Court is selected in a manner that requires the federal executive to obtain approval by the federal legislature. However, Nigeria falls into the states as indirect appointers category because the state judiciaries play a critical role in the appointment process. In this way, Nigeria is more similar to Austria than to the United States, yet Nigeria does not allow state governments to directly appoint members of the court like Ethiopia does.

The Federal Supreme Court of Nigeria handles federalism disputes.⁹⁷ The Federal Supreme Court is composed of a Chief Justice and a maximum of twenty-six other Justices as determined by an Act of the National Assembly. The National Assembly is comprised of the Senate and the House of Representatives.⁹⁸ Three representatives from each state and one representative from the federal territory of Abuja make up the Senate. The House of Representatives has 360 members. The number of members of the House of Representatives is in proportion to the members' constituencies.⁹⁹

The Justices of the Federal Supreme Court are nominated by the President of Nigeria, based on the recommendations of the National Judicial Council. The National Judicial Council consists of five Chief Judges of States, which guarantees the state judiciaries are represented, because the National Judicial Council presents candidates to the President.¹⁰⁰ The President's nominees must then be confirmed by the Senate in order to be fully appointed.¹⁰¹ Thus, the federal Senate

⁹⁷ Abebe, *supra* note 51, at 63.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Abebe, *supra* note 51, at 63.

¹⁰¹ CONSTITUTION OF NIGERIA (1999), § 231.

checks the power of the President, but the state judiciaries also provide input through the National Judicial Council.

E. Russia

Russia's appointment mechanisms allow states to give input through their federal mouthpieces near the end of the selection process. The Russian Constitution allows the Constitutional Court to arbitrate disputes between Moscow and the regional and local governments.¹⁰² The president nominates candidates to the Constitutional Court, and then the Federation Council or Council of Federation appoints candidates.¹⁰³ The Federation Council is the upper house of the Federal Assembly, Russia's parliament.¹⁰⁴ Thus, the head the of the federal government selects the pool of candidates without input from the states, but the states are represented in the Federation Council. The Federation Council has two representatives from each state-like body in Russia; one representative is selected from the region's legislative body, and one is appointed by the governor of the region.¹⁰⁵ The states are acting in an indirect, gatekeeper role. The president can pick the candidates but the states, through their representatives on the Federation Council, get to select who is ultimately appointed.

F. United Arab Emirates

¹⁰² KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 125 (Russ.).

¹⁰³ KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 128 (Russ.).

¹⁰⁴ Federation Council of the Federal Assembly of the Russian Federation, <http://council.gov.ru/en/structure/council/> (last visited Jan. 19, 2020).

¹⁰⁵ Federal'nyi Zakon RF O statuse člena Soveta Federacii i deputata Gosudarstvennoj Dumy Federal'nogo Sobranija Rossijskoj Federacii [Federal Law of the Russian Federation on the Status of a Member of the Federation Council and a Deputy of the State Duma of the Federal Assembly of the Russian Federation] 1994 (Russ.); Federation Council of the Federal Assembly of the Russian Federation, <http://council.gov.ru/en/structure/council/> (last visited Jan. 11, 2021).

The United Arab Emirates (UAE) is a federal country comprised of seven emirates.¹⁰⁶ The appointment procedures to the UAE's highest court allow for significant indirect state input.

The highest court in the UAE is the Federal Supreme Court and it decides questions of federalism.¹⁰⁷ The Federal Supreme Court has a Chief Justice and up to five judges; the judges are appointed by the federal President after the approval of the Supreme Council.¹⁰⁸ "The Federal Supreme Council is the highest authority in the UAE," and it is made up of "the Rulers of all the member Emirates of the UAE."¹⁰⁹ The Rulers are the highest executives from each of the Emirates, and the President is elected from the Rulers. The Rulers are absolute monarchs who are not elected. Thus, each state is directly represented by their highest executive on the Supreme Council. The emirates' input in the appointment of judges is still indirect because the President has the final say, but the Supreme Council's approval is required.

Austria, Belgium, the Congo, Nigeria, Russia, and the United Arab Emirates all allow states to act in an indirect role during the appointment of justices or judges to their courts that decide federal questions.

III. COUNTRIES WITH A SUBSTANTIAL AMOUNT OF STATE INPUT IN THE APPOINTMENT PROCESS

Very few countries allow the states to have a notably large role in the appointment process beyond an indirect role. Having a large role in appointment would look like allowing state legislatures, judiciaries, or executives to directly appoint justices. Bosnia and Herzegovina, Comoros, Germany, and Ethiopia fall into this category of countries.

¹⁰⁶ Functions of the Federal Supreme Court, <https://www.tamimi.com/law-update-articles/functions-of-the-federal-supreme-court/> (last visited Jan. 5, 2021).

¹⁰⁷ UNITED ARAB EMIRATES: CONSTITUTION [UNITED ARAB EMIRATES], 2 December 1971, art. 99.

¹⁰⁸ UNITED ARAB EMIRATES: CONSTITUTION [UNITED ARAB EMIRATES], 2 December 1971, art. 96.

¹⁰⁹ UNITED ARAB EMIRATES: CONSTITUTION [UNITED ARAB EMIRATES], 2 December 1971, art. 46.

A. *Bosnia and Herzegovina*

In Bosnia and Herzegovina, the Constitutional Court decides questions regarding federalism.¹¹⁰ The Constitutional Court is made up of four members selected by the House of Representatives of the Federation, two members selected by the Assembly of the Republika Srpska, and three members selected by the President of the European Court of Human Rights.¹¹¹ The members selected by the President of the European Court of Human Rights can only be selected following consultation with the Presidency.¹¹² Bosnia and Herzegovina consists of one unitary (The Republic of Srpska) and one federative (The Federation of Bosnia and Herzegovina) unit.¹¹³ The House of Representatives of the Federation of Bosnia and Herzegovina is the lower house and legislative body of the Parliament of the Federation of Bosnia and Herzegovina,¹¹⁴ and the National Assembly of Republic of Srpska is the legislative body of the Republika Srpska¹¹⁵; thus, the two regions have a say in the selection of justices.

Bosnia and Herzegovina provides an example of a country in which the legislative branches of state governments directly appoint members to the highest courts. This creates a check on central power and an avenue for addressing the concerns, because the members of the House of Representatives of the Federation of Bosnia and Herzegovina and of National Assembly of Republic of Srpska are elected by citizens in each region.

¹¹⁰ BOSNIA AND HERZEGOVINA CONST. 1995. art. VI § 3.

¹¹¹ *Id.* at § 1.

¹¹² *Id.*

¹¹³ Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook> (last visited Jan. 19, 2020).

¹¹⁴ Government of Federation of Bosnia and Herzegovina, <http://www.fbihvlada.gov.ba/english/> (last visited Jan. 19, 2020).

¹¹⁵ The National Assembly of the Republic of Srpska, <https://www.narodnaskupstinars.net> (last visited Jan. 19, 2020).

B. Comoros

As mentioned above, the Constitution of Comoros allows for state input into the appointment of members to its Constitutional Court, which decides federal disputes. The heads of the island executives appoint one member to the Constitutional Court, while the President of the Union, the Vice Presidents of the Union, and the President of the Assembly of the Union appoint the other members of the court. This would in theory give the islands significant influence on the highest court in the country. However, the current standing and jurisdiction of the Constitutional Court of Comoros are not clear¹¹⁶; thus, the islands' level of input on questions of federalism is ambiguous.

C. Ethiopia

Ethiopia's "court" appointment mechanisms create regional power and influence by having a unique body answer questions of federalism. In Ethiopia, a court does not decide issues of federalism, but a body of parliament does.¹¹⁷ The House of Federation (HoF) settles constitutional disputes, including disputes between the federal government and the states and disputes between the states.¹¹⁸ The HoF is composed of representatives of nations, nationalities, and ethnic groups. The ethnic groups are not represented equally in HoF; the largest ethnic groups have proportionately higher representation than other groups, but every ethnic group has at least one representative.¹¹⁹

¹¹⁶ The Editors, THE DANGERS OF ASSOUMANI'S 'CREEPING AUTHORITARIANISM' IN COMOROS, *World Politics Review*, Feb. 14, 2020.

¹¹⁷ Abebe, *supra* note 51, at 65.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The members of the HoF are solely nominated by the legislative councils of the states,¹²⁰ which gives the states a great amount of input into the appointment process. The states can elect members to the HoF, but this has never been done before. The federal government plays a very small role in the composition of the HoF; it can appoint a few members of the Council of Constitutional Inquiry.¹²¹ The Council of Constitutional Inquiry, which is made up of legal experts, assists the HoF in determining whether there is need for constitutional interpretation. If interpretation is needed, the Council makes recommendations. However, the HoF is not bound by recommendations from the council.¹²²

Through this unique body, Ethiopia creates opportunities for different ethnic groups, nations, and nationalities to be directly represented when deciding questions of federalism.

D. Germany

Germany allows input into its appointment process from members of the various Land (state) governments. The Constitutional Court of Germany decides issues relating to federalism.¹²³ The Federal Constitutional Court consists of federal judges and other members; half of the members are elected by the Bundestag and half by the Bundesrat.¹²⁴ Justices of the Court may not be members of the Bundestag, of the Bundesrat, or of the Federal Government.¹²⁵ The German Federal Parliament is a bicameral legislature that is made up of the directly elected Bundestag and the appointed Bundesrat.¹²⁶ The Bundesrat functions as the federal states' mouthpiece into

¹²⁰ Abebe, *supra* note 51, at 66.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Donald R. Reich, *Court, Comity, and Federalism in West Germany*, 7 *Midwest J. Pol. Sci.* 197, 197 (1963).

¹²⁴ GRUNDGESETZ [GG][BASIC LAW] art. 94, *translation at* https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en

¹²⁵ *Id.*

¹²⁶ Political System of Germany, <https://www.legco.gov.hk/research-publications/english/1415fsc05-political-system-of-germany-20150218-e.pdf>, 3 (last visited Jan. 19, 2020).

the appointment process. The Bundesrat representatives are appointed by the 16 federal states of Germany governments.¹²⁷ Thus, two federal bodies appoint members of the court, but one of these federal bodies is comprised of members of the state governments.

This is the second smallest category of appointment mechanisms. In between the spectrum of little to no meaningful state involvement to high state involvement lies the third category of countries in which state approval is necessary for appointment but not as powerful as the second category of countries.

CONCLUSION

Countries that allow state governmental bodies to provide substantial input into the appointment process of justices are few and far between. However, Bosnia and Herzegovina, Comoros, Ethiopia and Germany provide some guidance. Regions or states can also influence the outcome on questions of federalism by playing an indirect role in the appointment of judges or justices to constitutional or supreme courts. This can be seen in Austria, Congo, Nigeria, and Russia. The majority of countries allocate the power of appointment to the federal or central government, but even within this structure some provincial influence can be found. This can be observed in Canada, Malaysia, and South Africa. All three categories illuminate possibilities for appointing justices to courts that decide questions of federalism.

¹²⁷ GRUNDGESETZ, *supra* note 82 at art. 51.