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## Systems of Selection and Appointment of Judges and the Issue of Judicial Independence: American, English and German Experiences

**Abstract:** The article aims to investigate the influence of different systems of selection and appointment of judges adopted in the legal systems of the United States, England and Wales, and Germany on judicial independence. In these countries, the following methods are used for the selection of judges: appointment by the executive, appointment by the career or civil service judiciary, shared or parity appointments and appointment by judicial committees. Comparative law analysis shows that the adoption of a particular method for the selection of judges, especially in connection with the term of office, may have an impact on their independence and impartiality. Especially risky seems to be the American justice system, which rooted in the idea of “popular constitutionalism” methods of election and re-election of judges could jeopardize fair trial guarantees. In England and Wales, of great importance in strengthening the independence of the judiciary was the introduction of the Constitutional Reform Act of 2005 and the institution of the Supreme Court. In Germany, independence of the judiciary is guaranteed by the Constitution and the Constitutional Court. Further observations indicate that both in common and continental law, the universal guarantee of independence of the judiciary is for judges to follow ethical and professional dignity principles.

**Keywords:** judicial selection, judicial independence, Constitution, fair trial, judicial conduct

**Słowa kluczowe:** wybór sędziów, niezawisłość sędziowska, konstytucja, rzetelny proces, etyka sędziowska

### 1. Introductory notes

The literature on the subject lists several systems of appointing judges in European countries and in the USA: by executive appointment, through elections (direct or indirect), as career or civil service judiciary, by shared or parity appointment and through nomination by a judiciary committee.

Parity systems are based on judiciary posts being filled proportionally, based on a set criteria, including: political party, area, ethnic origins or gender. A shared appointment involves giving a range of bodies the right to appoint judges, for example with half the posts being filled through appointment by the President and half by one of the chambers of the Parliament. These model solutions can be deployed, due to constitutional differences between countries, in mixed forms, which makes it all the more difficult to ascribe them to any one system<sup>1</sup>.

Parity and shared appointment systems are deployed in various configurations in European countries in level judiciary bodies at the highest, acting as constitutional tribunals or supreme courts. Elements of these methods can also be found in elections to international criminal tribunals; these elections are regarded in literature and case law as a vital guarantee of independence and objectivity of presiding judges and of a due criminal process<sup>2</sup>.

A comparative legal analysis also needs to indicate the difference between the judge's role in determining the outcome of criminal proceedings (which is the main area covered in this article) in an Anglo-Saxon system and in the legal systems of continental Europe. In general, an English or an American judge is an impartial arbiter in an adversary trial in court which aims is to settle the argument between the prosecution and the defence, and in the German legal justice system analysed here (which the doctrine classifies as one of the systems in the civil law tradition) the judge has a statutory duty to uncover the material truth, regardless of the parties' evidence drive<sup>3</sup>.

## **2. The impact of the selection and nomination system on independence of judges**

The basic method of appointing federal judges in the USA is nomination by the President, who acts with the Senate's counsel and approval; the decision making process has a political dimension as over 90% of judges appointed by the President comes from his own party<sup>4</sup>. When filling posts in federal courts (district courts and

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1 M.L. Volcansek, *Judicial Elections and American Exceptionalism*, *Deapaul Law Review* 2010-2011, vol. 60, pp. 805-806 and literature cited there.

2 P. Wiliński, H. Kuczyńska, *Rzetelny proces karny w orzecznictwie międzynarodowych trybunałów karnych*, (in:) P. Wiliński (ed.), *Rzetelny proces karny*, Warszawa 2009, pp 188-189.

3 On the differences between the role of an Anglo-Saxon and Continental judge see W. Gontarski, *Porównanie niekontraduktoryjnego (kontynentalnego) procesu karnego z procesem kontraduktoryjnym (anglosaskim)*, (in:) P. Kruszyński (ed.), *Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym. System prawa karnego procesowego*, Warszawa 2014, pp. 145-158.

4 I. Kraśnicka, A. Ludwikowska, *Wprowadzenie do systemu prawa Stanów Zjednoczonych*, Toruń 2012, pp. 188-189 and references quoted there.

courts of appeal) the President is aided by the Attorney General, and their competences are assessed by the American Bar Association (ABA): Standing Committee on the Federal Judiciary. Similar procedure applies when nominating judges to the Federal Supreme Court, their choice is of vital importance to the President as the decisions in this court (acting as a Constitutional Court) impact on the functioning of the political system of the whole country. In appointing judges to this highest judiciary body the President is aided not just by the Attorney General, the ABA Standing Committee on the Federal Judiciary and the Senate Judiciary Committee who vet the candidates, but also by the judges of the Supreme Court acting on their own initiative or by request of the President. In recent years the process of appointing judges to the Supreme Court has evolved, and the role of various advisory bodies, especially the ABA Committee, participating in the procedure has also changed. A characteristic of this process is the strong involvement of various pressure groups in the process of appointing judges to the Supreme Court, which may significantly influence the Senate's decision to reject a particular candidate<sup>5</sup>.

In the case of the President nominating federal judges there is no such risk to their independence because under the Third Amendment to the USA Constitution their appointment is life-long. The situation with appointing state judges is quite different. Against the background of the variety of measures adopted in individual states it is possible to distinguish three fundamental methods of selecting these judges<sup>6</sup>:

- 1) Appointment by the governor or state legislature
- 2) Through general elections:
  - *partisan election*, where political party membership is stated next to the name of the judge, or
  - *non-partisan elections*, where this information is not given.
- 3) *Merit Selection* also known as the Missouri Plan, where candidates for judges are selected following a special procedure by legislative committees, based on potential judges' achievements and on competence criteria. The final appointment is usually made by the state governor from among three to five candidates selected by the committee.

American doctrine signals a number of issues associated with elections and nominations of state judges in the context of their independence on one hand and responsibility on the other. It underlines the fact that a lively discussion over the proper role of judges in the USA has been ongoing for about 200 years. Supporters

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5 *Ibid*, pp. 190-192, and references quoted there.

6 More on the development and detailed characteristics of these forms of selecting judges in the article by I. Kraśnicka, *Systemy wyborów sędziów stanowych w USA* (included in this publication) and J. Rosinek, *Some Thoughts on the Problems of Judicial Selections, Court Review*, Summer 2004, pp. 20-24.

of a strong and independent judiciary have maintained for years that the role of the judges is to honestly interpret the law and the Constitution, independently of such external factors as politics or public opinion. Therefore they ask that judges are not elected in general elections but appointed. On the other hand, those in favour of judges being accountable to society maintain that judges carry out government policy, acting within a democratic system and therefore they should, periodically, answer for their actions directly to society through elections, regardless of any impact on their independence<sup>7</sup>.

The shortcomings of having judges chosen through general elections include low voter awareness and knowledge with regards to candidates for judges, with the high costs of election campaigns implying a risk that judges' impartiality may be affected by the sympathies of their campaign donors<sup>8</sup>. It is worth referencing the decision in the case of the *Republican Party of Minnesota v. White* (536 U.S. 765, 788 (2002)), where the Supreme Court pronounced that candidates for judges under the First Amendment have a right to air their views on issues they will later be considering as judges. In turn, in the case *Caperton v. A.T. Massey Coal Co* (556 U.S. 868, 881-86 (2009)) the Supreme Court of the USA found, for the first time, that behaviour pertaining to the judge's election campaign may affect due process rights. The court accepted that a serious bias risk, too high to be tolerated in accordance with the Constitution, arose in the situation when newly elected Judge of the West Virginia Court of Appeals B. Benjamin recognised an appeal concerning his most significant sponsor in the judiciary elections campaign, Don Blankinship. The sponsor spent several million dollars to ensure the electoral success of Judge Benjamin, knowing that straight after the elections his case was heading for the Court of Appeals<sup>9</sup>.

However, the real threat to independence and impartiality of judges lies not in their first selection (through general elections, by appointment or through the *Missouri Plan* procedure) for a limited term, but in the method of extending that term (*retention*). At the end of the last century in the USA in the Courts of Appeal and in the courts of the First Instance (county and district courts) the vast majority of judges underwent various forms of selection and retention.

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7 D.C. Brody, The Use of Judicial Performance Evaluation Enhance Judicial Accountability, Judicial Independence, and Public Trust, "Denver University Law Review" 2008-2009, vol. 86, pp. 115-117 and C.G. Geyh, The End- less Judicial Selection Debate and Why it Matters for Judicial Independence, "The Georgetown Journal of Legal Ethics" 2008, vol. 21, pp. 1259-1263 and literature quoted there.

8 C.G. Geyh, The Endless Judicial Selection Debate..., *op. cit.*, pp. 1265-1270, and research results included therein.

9 For the analysis of this decision see: M.H. Redish, J. Aronoff, The *Real* Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and The Dangers of Popular Constitutionalism, "William & Mary Law Review" 2014, vol. 56, pp. 4-5 and 20-30, and quoted case law SN USA.

Table 1. Selection and retention systems for state judges in the USA

<b>Courts of Appeal</b>	
Joint number of appeals judges: 1.243 Joint number of those who underwent various selection procedures: 1.084 (87%) Joint number of those who underwent competitive selection: 659 (53%)	
<b>First selection conditions</b> appointment: 582 (47%) partisan elections: 495 (40%) non-partisan elections: 166 (13%)	<b>Following selection conditions</b> appointment: 133 (11%) partisan elections: 400 (32%) non-partisan elections: 166 (13%) retention elections (non-competitive): 518 (58%)
<b>Courts of the First Instance (Trial Courts) of general jurisdiction</b>	
Joint number of judges: 8.849 Joint number of those who underwent various selection procedures: 7.378 (87%) Joint number of those who underwent competitive selection: 6.650 (77%)	
<b>First selection conditions</b> appointment: 2.061 (24%) partisan elections: 3.661 (43%) non-partisan elections: 2.759 (33%)	<b>Following selection conditions</b> appointment: 1.013 (12%) partisan elections: 2.360 (28 %) non-partisan elections: 2.891 (35%) retention elections: 2.127 (25%)

Source: J. Rosinek, *Some Thoughts on the Problems of Judicial Selections*, *Court Review*, Summer 2004, p. 21.

In the literature on the subject it is therefore argued that a state judge, in the instance of the first appointment (regardless of the selection method), usually for the period of a few years, may be afraid to pronounce independently and impartially and risk the displeasure of voters or the appointing executive body. The popular constitutionalism which is at the foundations of the general elections method of selecting judges, is juxtaposed with real constitutionalism and its embodiment in the criminal process that is the concept of the due process of law<sup>10</sup>.

On the issue of the impact of the selection method for the appointment and retention of a state judge on his/her later interpretation of the law, there is insufficient research that would unequivocally prove such a link, which leads to continued debate among the proponents of such thesis<sup>11</sup>, and its opponents<sup>12</sup>. However, the majority of authors present a uniform view on the importance of the judges' ethics for maintaining independence and impartiality, its corporate embodiment is the *American Bar Association's Model Code of Judicial Conduct*<sup>13</sup>.

10 M.H. Redish, J. Aronoff, *The Real Constitutional Problem...*, *op. cit.*, pp. 33-45.

11 See, apart from M.H. Redish and J. Aronoff cited above, also P. Bruhl and Ethan J. Leib, *Elected Judges and Statutory Interpretation*, "University of Chicago Law Review" 2012, vol. 79, pp. 1215-1230.

12 Bertrall L. Ross II, *Reconsidering Statutory Interpretive Divergence between Elected and Appointed Judges*, "University of Chicago Law Review" 2013, vol. 89, pp. 53-80.

13 See e.g. C.G. Geyh, *The Endless Judicial Selection Debate...*, *op. cit.*, p. 1259 onwards

### 3. Appointing judges in England and Wales and the 2005 Constitutional Reform Act

The English and Welsh justice system deploys community magistrates (lay judges or Justices of the Peace) in magistrates courts (of which there were around 30 000 in 2007); according to the 2003 *Courts Act*, these are appointed in the name of the Queen by the Lord Chancellor. When making a decision on appointment, the Lord Chancellor applies first and foremost the criteria of the appropriate personal character and competences required to work as a judge and whether the candidate would therefore be accepted by the rest of the judiciary. At the same time, this method of appointing judges by the executive has been met with criticism in the doctrine as the nominees more often than not come from higher social class and are not representative of the community (especially as the proportion of ethnic minority magistrates are just a few percent)<sup>14</sup>. Before being employed, magistrates are given a one year foundation course on their future duties. The aim of the training is to give them basic knowledge of the law and evidence-led trial, on the rules of criminal procedures and sentencing guidelines and the role of other participants in criminal proceedings (e.g. the justices' clerk and court staff and the representatives of the sides in a trial).

Magistrates may be recalled by the Lord Chancellor in circumstances envisaged in the 2003 *Courts Act* (Art. 10), for example: an inability to practice in the profession, or misconduct, failing to meet professional standards and discharge decision making duties.

In turn, professional judges in magistrates courts – *district judges* – previously called *stipendiary magistrates*, are professionals who receive a salary for discharging their duties. They are called up by the Queen on the basis of the Lord Chancellor's recommendations from among barristers and solicitors with at least seven years professional work experience. There are around 140 of district judges, aided by numerous deputies employed part time and awaiting their chance of full employment. District judges work until pensionable age (generally until the age of 70), but may be prematurely deprived of the office by the Lord Chancellor if they become unable to carry out their duties or are guilty of misconduct (*inability or misbehaviour*).

Crown Courts, which are courts of the first instance in more serious criminal cases which require an act of indictment as well as an appeals body for decisions made in Magistrates' Courts, have High Court judges (around 20) considering the most serious cases, and circuit judges, who consider around 80% of all cases, as well as recorders employed part time, who may combine their function as a judge with their solicitor practice. Circuit judges are appointed by the Queen on the basis of the Lord Chancellor's recommendation and, as full time judges, must have at least 10 years

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14 J. Sprack, *A Practical Approach to Criminal Procedure*, Oxford 2008, pp. 90-91.

practical experience in the judiciary or have held a post in an administrative court. They may likewise be deprived of their post by the Lord Chancellor before retirement in case of inability to perform their function or misconduct. Like district judges, recorders are appointed by the Queen on the Lord Chancellor's recommendation from eligible barristers with at least 10 years professional experience, but for a limited period of time, until they have presided over a certain number of cases; when not settling cases, they may carry out their legal practice.

The Lord Chancellor's dominant role in appointing and recalling judges resulted from the fact that England and Wales do not have a Constitution as a highest ranking legal act which on the Continent usually determines the guarantees of the independence of judges. After the provisions of the European Convention of Human Rights were incorporated into the legal system of England and Wales under the 1998 *Human Rights Act* there was a need to legally guarantee the independence of English courts (as required under Art. 6 Section. 1 ECHR), and to create the institution of the Supreme Court. This requirement had not been met by the Appellate Committee of the House of Lords as it was dependent on the upper chamber of the Parliament. The situation changed after the 2005 *Constitutional Reform Act* (CRA) was passed – which introduced the institution of the Supreme Court to the UK legal system. This act, according to the government justification of a government project, reshaped the relationship between the legislature and the executive into a modern format<sup>15</sup>. In terms of appointing judges the significant development was the establishment of the Judicial Appointments Commission, which limited the role of the Lord Chancellor to accepting or, exceptionally, rejecting its recommendations on candidates for judges. The CRA has also significantly affected the system of appointing and disciplining judges through establishing the Office of the Judicial Appointments and the Conduct Ombudsman.

Article 1 of the CRA places a duty on all government ministers, but in particular the Lord Chancellor, to uphold judicial independence. Judicial independence is defined in English literature as the freedom of judges to uphold the rule of law and protect human rights, and to maintain impartiality in every case they deal with and in all circumstances. It is thought that this is not just a privilege of the judiciary but that it implies *a right of the people and of a person and a duty of the judiciary and a judge*<sup>16</sup>.

Highlighting the limited potential of the Lord Chancellor (as a government minister who, after the reform, does not even have to be a lawyer) to safeguard judicial independence, this underlines the vital role of the judges themselves in ensuring

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15 D. Woodhouse, United Kingdom. The Constitutional Reform Act 2005 – defending judicial independence the English way, "The International Journal of Constitutional Law" 2007, vol. 5, pp. 153-154.

16 D. Woodhouse, United Kingdom. The Constitutional Reform Act 2005..., *op. cit.*, pp. 156-157 and literature quoted there.

transparency and accountability of their actions. The guidelines on the conduct of judges, assembled in 2002 as part of the *Guide to Judicial Conduct* and adopted by the judiciary of England and Wales in October 2004, should be of help here<sup>17</sup>.

English studies also stress the vital role in safeguarding judicial independence that is assigned to a “a proactive, open, and accountable Supreme Court [that] is likely to be more effective in protecting judicial independence than a government minister – even one with the exalted title of lord chancellor”<sup>18</sup>.

#### **4. The systems of appointing judges in Germany and constitutional guarantees of their independence**

The choice of the German system for these analyses is due to at least the following factors. First of all, this is a classic example of a continental civil law system which fully subscribes to the principle of ‘material truth’ in criminal proceedings. Secondly, this country has a federal system of states with a certain amount of autonomy (also in terms of appointing judges) which, however, is difficult to compare with the autonomy of the states of the USA.

At present the courts of law of the Federal Republic of Germany dealing with criminal cases include (local) district courts (*Amtsgerichte*), regional (state level) courts (*Landgerichte*) and higher regional courts (*Oberlandesgerichte* – OLG)<sup>19</sup>. Criminal cases are also dealt with by the Federal Supreme Court (*Bundesgerichtshof* – BGH), state level constitutional courts (*Landesverfassungsgerichte*) and the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG).

Election of judges, where political factors are clearly at play, applies first and foremost to constitutional tribunals; which merit therefore a short summary. The status of the Constitutional Court is defined in Germany under Art. 92-94 of the Constitution of the Federal Republic of Germany (*Grundgesetz* – GG). Art. 94 Section 1 GG specifies that half of the Court’s judges are elected by the Parliament (*Bundestag*), and half by the *Bundesrat* (federal council) through a qualified majority of 2/3 of the votes. Detailed guidelines for the selection of these judges are provided under the Federal Constitutional Court Act (*BVerfGG*), issued on the basis of Art. 94 Section 2 GG. Formally, judges of the Court are appointed by the President of the Federal Republic of Germany, but his role is simply to enact the decision of the Parliament and the Council. The requirement for the majority of the two thirds of votes in the

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17 Przewodnik etyki sędziowskiej. Zasady etyki dla sędziów Anglii i Walii. *Guide to Judicial Conduct* (Introduction by R. Sarkowicz), Warszawa 2007.

18 D. Woodhouse, United Kingdom. *The Constitutional Reform Act 2005...*, *op. cit.*, p. 165.

19 Regarding the remit and guidelines for the functioning of German courts of law in criminal proceedings see e.g.: Ł. Malinowski, *Postępowanie po wniesieniu aktu oskarżenia do sądu*, (in:) *Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym*, *op. cit.*, pp. 422-436.



electoral bodies is to guarantee the non-partisan character (*Unparteilichkeit*) of judges and ensure cross party nature of the composition of the Court (*Überparteilichkeit*). The result of this method means that smaller parliamentary factions may count on securing one or two appointments to the Court. Sitting judges also act as advisors in elections, but their lists of recommendations are not binding for the electoral body. The German doctrine criticises the significantly political nature of electoral procedures to *BVerfG* as reducing the chances of 'politically neutral' judges, and a greater transparency of such elections is called for, as well as having regards to the views of the judges sitting in the Constitutional Court<sup>20</sup>.

In the Federal Republic of Germany independence of the judiciary is guaranteed under the Constitution, first and foremost under Art. 97 which in Section 1 declares that judges are independent and are answerable only before legal acts<sup>21</sup>.

Both the doctrine and the *BVerfG* case law assume that the concept of judiciary independence covers both the material (Art. 97 Section 1 GG), and the personal (Art. 97 Section 2 GG) aspect which basically guarantees that the judge cannot be removed from their post (see e.g. the Tribunal's view in the decision of 23<sup>rd</sup> May 2012, 2 BvR 610/12, BvR 625/12, the decision of 14<sup>th</sup> July 2006, 2 BvR 1058/05 and other decisions referenced later in this article)<sup>22</sup>.

The Federal Constitutional Court dealt with the case of compatibility of state regulations concerning elections to state-level constitutional courts with the constitutional principle of judiciary independence. In the decision of 23<sup>rd</sup> July 1998 (1 BvR 2470/94) *BVerfG* decided that the rules for electing judges to the Bavarian Constitutional Court by the Parliament of this federal state through ordinary, not qualified, majority, were compatible with the German Constitution. In this decision the Court highlighted the fact that it is not the method of electing judges that is of fundamental importance to their independence, but their adherence to professional principles and the ethics of the profession.

In terms of selection of judges to German courts of law, the judiciary career model applies. Law graduates are required to pass a final exam and those with the best results have a chance of applying for a post in courts of the lower instance (*Amtsgerichte*). Each federated state (*Bund*) of the Federal Republic of Germany has temporary commissions for appointing professional judges; acting on the basis of Art. 95 Section 2 of the Constitution and the Act on the Selection of Federal Judges (*Richterwahlgesetz* – *RiWG*).

20 F. Wittreck, *Die Verwaltung der Dritten Gewalt*, Tübingen 2006, pp. 268-271 and literature cited there.

21 See e.g. M. Fornauf, *Die Marginalisierung der Unabhängigkeit der Dritten Gewalt im System des Strafrechts*, Frankfurt am Main 2010, pp. 79-83. See also the decision of 23.05.2012 by the German Constitutional Court *BVerfG*, 2 BvR 610/12 (para 12-14).

22 Decisions of the Federal Constitutional Court are quoted after its official internet page: [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) (accessed on: 17.06.2014).

Candidates for judges are presented by the appropriate Minister of Justice of a federal state, or representatives of an election committee, and then voted by the presidium of the court where the candidate is to take up the post.

The election committee has access to candidates' personal files and documents concerning their career history and achievements. Based on this, it assesses the candidate's professional competences and personal characteristics that would predispose them to meet the demands of the post, and makes a decision through a secret ballot. If the minister approves the recommended candidate, he then presents the candidature to the president of the Federation who appoints the candidate to the office of a judge – the appointment needs to be countersigned by the German Chancellor or the appropriate Minister (Art. 60 and 58 GG).

As previously quoted sources have indicated, this process of selecting judges in Germany also has its critics; they allege lack of transparency and the choice being dictated not solely by the candidate's level of professional knowledge but also political leanings. It also needs to be noted that the Constitution of the Federal Republic of Germany leaves the federated states a large degree of freedom to shape their own detailed regulations of selecting judges of courts of law (Art. 98 Section 3-5 GG).

Judges in courts of law are generally appointed for life, although there is a mechanism for appointing a judge for a trial period of several years, (*Proberichter*), which is similar to the institution of a court assessor, now withdrawn from the Polish justice system.

It is worth including select examples of case law based on the decisions of the Federal Constitutional Court concerning the principle of independence of judges in courts of law. The case law indicates that a 'probationary judge' does not enjoy all the attributes of judicial independence but has every right (together with judges of other German states) to apply for a lifelong office of a judge in the state appropriate to the court where he currently works. In a BVerfG decision of 4<sup>th</sup> December 2006 (2 BvR 2494/06) concerning this issue, the court decided that regulations in force in the state of Schleswig-Holstein, which essentially debarred candidates from outside of the state from applying for the office of a judge in a district court in this state (including a fully-fledged judge from Lower Saxony), were in accordance with the Constitution.

In turn, in the decision of 16<sup>th</sup> March 2005 (2 BvR 957/05) the Federal Constitutional Court decreed as compatible with the Constitution of the Federal Republic of Germany (and in particular with the Art. 97) a decree of the Nordrhein-Westfalen Ministry of Justice, which made an appointment of a judge of a state court to a post in a higher state court (*Oberlandesgericht*) dependent on being previously delegated to that court.

Among decisions concerning internal factors, resulting from how courts organise their own work but potentially impacting on independence and impartiality of judges, are on one hand decisions declaring that computerisation of courts and electronic processing of data held in court files does not impact on the freedom of

casework of judges (decision BVerfG of 6 October 2011, 2 BvR 2576/11), on the other hand decisions declaring that a judge enjoying the guarantees of independence has rights under Art. 101 Section 1 GG protecting him from being disproportionately burdened with work by the president of the court (decision BVerfG of 23 May 2012, 2 BvR 610/12).

## 5. Conclusions

For the purpose of this article this necessarily abridged analysis of the legal systems of the USA, England & Wales and Germany facilitates a hypothesis that the methods of election, and appointment of judges, may impact on the independence and impartiality of judges. Measures adopted in Anglo-Saxon law and on the Continent (on the example of Germany) imply various threats to these basic traits of the legal and social status of judges. Particular risks seem to be posed by the American justice system where the establishment of the popular constitutionalism method of election and re-election of state judges may threaten the guarantees of due legal process. American research to a significant degree justifies the thesis that particularly with direct elections of state judges they may feel constrained in their future casework by the views of their voters. This threat is particularly real in those states where judiciary offices are term-based, and judges themselves are subject to re-election procedures where the assessment of their work so far by either the electorate or the nominating body counts. Only federal judges (especially in the Supreme Court) are free of such influences since the Constitution guarantees them their function for life.

In the English legal system the weakening of the dominant influence of the administrative component for the nominations of judges, that is, of the Lord Chancellor (acting on his own behalf or on behalf of the Queen), may be observed, coupled with a growth in the influence of the judiciary community on selection procedures. A significant change was triggered by the 2005 Constitutional Act which introduced not only the Judiciary Appointments Commission but also the institution of the Supreme Court, tasked among other things with providing the guarantee of judiciary independence. This, in turn would suggest a somewhat controversial thesis that the English solutions for selecting judges to the courts of law are getting closer to the model of a professional career, dominant on the Continent and specifically adopted in Germany. The discussion of the German justice system highlights the importance of elevating the guarantees of independence and the impartiality of judges to a constitutional level for ensuring independence and the impartiality of judges, and protection through the case law of the Constitutional Court.

In all legal systems analysed here central government bodies (Parliament, and in the case of the USA – President) have secured a dominant influence on appointing the judiciary of the highest instance courts. However, the views of the doctrine quoted in

this article, as well as case law from the USA, Germany and England, stress that the universal guarantee of the independence of judges presiding over cases in courts of all instances is their adherence to professional integrity and ethics.

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