

# German state constitutional courts: the justices<sup>1</sup>

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## 1 Introduction

Why should we be interested in how justices of German state constitutional courts are selected and elected? For three reasons: first, perceptions can be deceiving. Many believe that in Germany there is just the Federal Constitutional Court (FCC) that says what “the constitution is”<sup>2</sup> and that state constitutional courts<sup>3</sup> are negligible. The latter are understood as obscure institutions that most people have never heard of and that rarely make the news.<sup>4</sup> This view takes public perception at its face value. Thus, if something gets little or no media attention then it is of no relevance. Such a view might fit nicely in the world of the Kardashians. However, a scientific analysis should never confuse face value and media attention with the real world. So, even if rarely reported on a nationwide scale, state constitutional courts have a mandate and obligation to “say what state constitutions are” and to act as a check on state legislatures and state governments. It is for this reason that former presidents of the FCC and former justices of state

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- 1 This paper first appeared in the summer issue 2021 of *German Politics and Society* (Vol. 39, issue 2). I am very grateful to the editors of the journal and notably to Eric Langenbacher for granting me the permission to republish my article and to have a slightly updated version included in the conference volume. This work was supported by the Deutsche Forschungsgemeinschaft under Grant RE 1376/4-1 and RE 1376/4-2. Please also note, that I use the terms state or states instead of *Land* or *Länder*.
  - 2 This phrase goes back to *Marbury vs. Madison* 5. U.S. (1 Cr.) 137, 177 (1803) which stated that it is “emphatically the province and duty of the judicial department to say what the law is.”
  - 3 For clarity I use the term state constitutional court instead of *Land* constitutional court (or in German *Landesverfassungsgericht*). However, it should be kept in mind that German *Länder* enjoy state privilege but are not sovereign. They are not to be understood as a sort of nation-state in embryo.
  - 4 Interestingly enough, some 30 years ago George Alan Tarr and M. C. Porter believed that American State Supreme Courts acted in “relative obscurity” as well; George Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (Yale University Press 1988), 1.

constitutional courts stress the contributions that German subnational constitutional courts make to the rule of law, to democracy, and to federalism.<sup>5</sup>

Second, state constitutional courts hand down more than 700 decisions per year (some 45 per court).<sup>6</sup> Some of these rulings have even made headlines,<sup>7</sup> but even more important are the routine decisions that rarely receive nationwide media attention and that pertain to the power of parliaments, the separation of powers in the states,<sup>8</sup> to direct democracy,<sup>9</sup> to electoral

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- 5 Hans-Jürgen Papier, 'Die Bedeutung der Landesverfassungsgerichtsbarkeit im Verhältnis zur Bundesverfassungsgerichtsbarkeit' in Helge Sodan (ed), *Zehn Jahre Berliner Verfassungsgerichtsbarkeit: Ansprachen anlässlich des Festaktes am 24. Mai 2002* (Carl Heymans 2002), 19; Matthias Dombert, 'Landesverfassungen und Landesverfassungsgerichte in ihrer Bedeutung für den Föderalismus' in Ines Härtel (ed), *Handbuch Föderalismus: Band II: Probleme, Reformen, Perspektiven des deutschen Föderalismus* (Springer 2012), 19; Andreas Voßkuhle, 'Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsgerichtsverbund', in Peter Häberle (ed), 59 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2011), 215; Sascha Kneip, 'Verfassungsgerichte und Demokratie in Bund und Ländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 25; Marcus Höreth, 'Der Beitrag der Landesverfassungsgerichte zur Unitarisierung des Bundesstaates', in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 49.
  - 6 Werner Reutter, 'Landesverfassungsgerichte in der Bundesrepublik Deutschland: Eine Bestandsaufnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 1; Werner Reutter, 'Landesverfassungsgerichtsbarkeit, Verfassungsgerichtsverbund, und Verfassungsdemokratie in der Bundesrepublik Deutschland' in Oliver Lepsius et al. (eds), 70 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2022), 855.
  - 7 See, for example, Michael Sachs, 'Verfassungsrechtliche Anmerkungen zum Strafverfahren gegen Erich Honecker' (1993) 40 *Zeitschrift für Politik* 121; Verfassungsgerichtshof des Landes Berlin, *Beschl. vom 12. Januar 1993 – VerfGH 55/62*; Bayerischer Verfassungsgerichtshof, *Urteil vom 20. März 2019 – Az Vf. 3-VII-18*; Sächsischer Verfassungsgerichtshof, *Urteil vom 16. August 2019 – Vf. 76-IV-19 (HS), Vf. 81-IV-19 (HS)*.
  - 8 Franziska Carstensen, 'Parlamentsrechtliche Entscheidungen von Landesverfassungsgerichten in Organstreitverfahren' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 237; Pascal Cancik, 'Entwicklungen des Parlamentsrechts – Die Bedeutung des verfassungsgerichtlichen Organstreitverfahrens' (2005) 58 *Die Öffentliche Verwaltung* 577; Martina Flick, *Organstreitverfahren vor den Landesverfassungsgerichten: Eine politikwissenschaftliche Untersuchung* (Peter Lang 2011); Martina Flick, 'Der Einfluss der Landesverfassungsgerichte auf das Parlamentsrecht der deutschen Bundesländer' (2011) 42 *Zeitschrift für Parlamentsfragen* 587.
  - 9 Arne Pautsch, 'Landesverfassungsgerichte und direkte Demokratie' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 263.

systems,<sup>10</sup> to constitutional rights of local communities,<sup>11</sup> or to the constitutionality of administrative measures to fight the Covid-19 pandemic.<sup>12</sup> Of course, this includes rulings of subnational constitutional courts pertaining to fundamental rights such as freedom of religion, speech, or the right to peaceful assembly.<sup>13</sup> True, only a few of these decisions receive media attention and if so mostly in local or regional journals. Nevertheless, these decisions effectively impact on politics, policy, and public life in Germany at the subnational level. Furthermore, as Charlie Jeffery and others have argued,<sup>14</sup> at least since unification there has been a growing tendency towards regionalization and territorialization of politics in Germany. Such a trend would increase and reinforce the contribution of state constitutional courts to the functioning of federalism, constitutional democracy, and the rule of law.

Third, as we know from other European countries and the USA, the appointment of justices to high courts is a crucial issue for the legitimacy of the rule of law in general and these institutions in particular. Not surprisingly, studies on how justices are appointed to national high courts are legion. Although there exists a host of studies on the composition of American state supreme courts,<sup>15</sup> our knowledge about justices serving

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- 10 Jürgen Plöhn, 'Landesverfassungsgerichte und Landtagswahlen: Wahlrecht 'ad libitum' oder unter 'strict scrutiny' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 289.
  - 11 Marcus Obrecht, 'Landesverfassungsgerichte, kommunale Selbstverwaltung und Gebietsreform' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 323.
  - 12 As of 18 August 2020 at least 70 cases that pertain to measures for dealing with the Covid-19 pandemic have been filed at state constitutional courts; <<https://dejure.org/corona-pandemie#Verfassungsgerichtsbarkeit>> accessed 18 August 2020.
  - 13 Christian Henkes and Sascha Kneip, *Das Kopftuch im Streit zwischen Parlamenten und Gerichten: Ein Drama in drei Akten*, Discussion Paper SP IV 2009–201 (Wissenschaftszentrum Berlin für Sozialforschung).
  - 14 Charlie Jeffery, Niccole M. Pamphilis, Carolyn Rowe and Ed Turner, 'Regional policy variation in Germany: the diversity of living conditions in a 'unitary federal state'' (2014) 21 *Journal of European Public Policy* 1350; Werner Reutter, *Die deutschen Länder: Eine Einführung* (Springer 2020).
  - 15 See, for example, George Alan Tarr, *Without fear or favor: Judicial independence and judicial accountability in the states* (Stanford University Press 2012); Matthias Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Poli-*

on German state constitutional courts is still comparatively scant.<sup>16</sup> These courts and the justices who serve on them have long been ignored by political scientists. Some legal scholars have described and evaluated the formal appointment process as laid down in the legislation on state constitutional courts. In addition, several recent empirical case studies have been published in Germany. This growing interest has arisen partly because the appointment of justices to state supreme courts has become a controversial issue charged with partisan interests and conflicts. In the meantime German states have seen several courts with justices nominated by the right-wing populist or extremist party known as the AfD (*Alternative für Deutschland*).<sup>17</sup> The nomination and election of a nominee to the constitutional court in Saxony-Anhalt has also garnered nationwide attention and critical comments.<sup>18</sup>

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*cal Transformations* (Cambridge University Press 2019), 281–291; Anne Sanders and Luc von Danwitz, ‘Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy’ (2018) 19 *German Law Journal* 769.

16 See Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017); Werner Reutter, *Landesverfassungsgerichtsbarkeit* (Kohlhammer 2022), 87–105.

17 Studies by legal scholars focus on the formal side of the appointment processes without providing data on elections in parliaments or on the composition of benches; e.g. Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449; Beate Harms-Ziegler, ‘Verfassungsrichterwahl in Bund und Ländern’ in Peter Macke (ed), *Verfassung und Verfassungsgerichtsbarkeit auf Landesebene: Beiträge zur Verfassungsstaatlichkeit in den Bundesländern* (Nomos 1998), 191; Franz Knöpfle, ‘Richterbestellung und Richterbank’ in Christian Starck and Klaus Stern (eds), *Landesverfassungsgerichtsbarkeit: Teilband I: Geschichte, Organisation, Rechtsvergleichung* (Nomos 1983), 231. This article very much profits from: Werner Reutter, ‘Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern’ in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203. There is also a number of case studies on single courts to which I will refer in due course.

18 Werner Reutter, ‘Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern’ in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203; Werner Reutter, ‘Der “Fall Borchardt“ und die Wahl von Landesverfassungsrichter\*innen’ (2020) 56 *Recht und Politik* 407.

The answer to my original question is hence threefold. State constitutional courts enjoy broad jurisdiction and are the ultimate umpire with regard to subnational constitutional questions. They hand down decisions that affect the public life of the states. And lastly, we so far know precious little about how justices of state supreme courts are selected and elected. The goal of my study is to partly remedy this deficit by shedding some light on the justices of state constitutional courts.

However, this paper is about reaching an understanding rather than merely testing hypotheses based on a theory of judicial recruitment in the German states. For an analysis of how justices to German subnational courts are elected and to assess the demographic makeup of courts, I still need a theoretical framework in order to structure my analysis and evaluate the election process and composition of these courts. State constitutional courts have an ambivalent status. Like other institutions that exercise public power, state constitutional courts need democratic legitimacy. Thus, they depend on politics. At the same time, in their function as courts they are part of the German judicial system and supposed to act as checks on the other branches of government. In this regard they are expected to be politically independent and neutral institutions.

Any system of appointment of justices to constitutional courts has to take this ambivalent status into account. This system needs to serve two constitutional ideas: democracy and the separation of powers. Arguably, there are many ways to balance these contradictory criteria.<sup>19</sup> The “European Commission for Democracy through Law”, better known as the Venice Commission, distinguishes three pathways for appointing justices: the direct appointment system (without a voting procedure), the elective system (where the parliament elects justices), and hybrid systems (which combines the other two).<sup>20</sup> While the first is supposed to give precedence to an independent judiciary, the second should favor democratic legitimacy.<sup>21</sup> We find similar considerations with regard to the appointment of justices

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19 Matthias Kumm, ‘On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019), 281, 286.

20 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <[https://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)> accessed 17 January 2020, 4–5.

21 Venice Commission, *ibid.*, 9.

to American state supreme courts. Appointing justices to state supreme courts also has to follow the requirements of democratic accountability and judicial independence.<sup>22</sup> In contrast to the American states that use various methods when appointing justices to state supreme courts,<sup>23</sup> the German states overwhelmingly apply the “elective system”. Just two out of 164 sitting justices have not been elected by a state parliament but rather appointed by a minister of the judiciary. My analysis builds on the theoretical cornerstones previously laid out,<sup>24</sup> and reflects on the fact that the selection, appointment, and composition of justices of state constitutional courts must comply with the principles just explained. I explore these dimensions in four steps. First, I describe the recruitment of constitutional justices; second, I examine how justices of state constitutional courts are elected; third, I analyze how the terms of justices end; and finally, I explore the demographic makeup of the courts.

According to Barbara Geddes,<sup>25</sup> good research in social sciences depends – among other things – on the cases you pick, and the evidence you collect. I picked all available cases and included all sixteen German state constitutional courts in my survey. The survey is based on data found in parliamentary records, in the *Handbuch der Justiz* (Handbook of the Judiciary), on homepages of the state constitutional courts, in entries in Wikipedia and other secondary sources.<sup>26</sup> The sources provide reliable data on the votes on justices in state parliaments. Yet it is far more difficult to find information on how candidates are selected and recruited. Similarly, the makeup of the judiciary in state constitutional courts is restricted to those aspects that are reported in official records (gender, main profession,

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22 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010), 52–61.

23 George Alan Tarr, *ibid.*; George Alan Tarr, *Without fear or favor: Judicial independence and judicial accountability in the states* (Stanford University Press 2012).

24 Stefan Haack, ‘Organisation und Arbeitsweise der Landesverfassungsgerichte in Deutschland’ (2010) 24 *Nordrhein-Westfälische Verwaltungsblätter* 216; Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449.

25 Barbara Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* (The University of Michigan Press 2003).

26 Deutscher Richterbund (ed), *Handbuch der Justiz*, (C F Müller 1953 et seq.); Werner Reutter, ‘Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern’ in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203.

age). I included all justices elected to the sixteen German state constitutional courts over the time periods shown in table 1.

*Table 1: Justices of state constitutional courts: nominations and elected justices*

State (court established in)	Period covered by the survey (years)	Number of nominated candidates <sup>a</sup>	Elected justices (including deputies)
Baden-Württemberg (1955)	1955–2018 (63)	213	203
Bavaria (1947)	1947–2018 (71)	677	616
Berlin (1992)	1992–2018 (26)	40	37
Brandenburg (1993)	1993–2018 (25)	49	36
Bremen (1949)	1999–2019 (20)	127	125
Hamburg (1953)	1997–2018 (21)	75	75
Hesse (1948)	1948–2019 (71)	450	446
Mecklenburg-Western Pomerania (1995)	1995–2017 (22)	41	41
Lower Saxony (1957)	1957–2019 (62)	195	194
North-Rhine Westphalia (1952)	1952–2018 (66)	187	187
Rhineland-Palatinate (1947)	1947–2019 (72)	332	330
Saarland (1959)	1959–2015 (56)	49	49
Saxony (1993)	1993–2017 (24)	85	83
Saxony-Anhalt (1993)	1993–2017 (24)	58	58
Schleswig-Holstein (2008)	2008–2018 (10)	30	30
Thuringia (1995)	1995–2018 (23)	116	101
Σ	– (639)	2,724	2,611

a) All nominees proposed for election or ex officio appointment as justice (or as a deputy to a justice); multiple nominations included; for Saarland only elected justices.

Source: my survey based on parliamentary records; Peter Rütters, ‘Saarland: Von der Verfassungskommission zum Verfassungsgerichtshof’ in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen*, (Springer 2017), 297, 304.

## *2 Recruitment of justices to state constitutional courts: selection trumps election*

From a formal point of view, the election of justices of state constitutional courts is straightforward. Members of parliament vote on candidates with the majority laid down in the constitution or the statutory laws on state constitutional courts. However, it would be misleading to assume that the

vote in a parliament represents the crucial step in this election process. On the contrary, it seems that finding and recruiting the right candidates are far more important. We can thus conclude that selection trumps election. This can be shown by analyzing the process of recruiting and proposing candidates which comprises three dimensions: (a) eligibility requirements, (b) the selection of candidates, and (c) the right to propose candidates to parliaments.

*Table 2: Justices in German state constitutional courts: number and eligibility requirements*

	Number of justices (Deputies)	Minimum age	Maximum age <sup>a</sup>	Eligibility for
BW	9 (9)	–	–	–
BAV	38 (38)	40	–/65	state parliament
BER	9 (–)	35	–	Bundestag
BB	9 (–)	35	68/68	Bundestag
BRE	7 (7)	35	–/65	Bundestag
HAM	9 (9)	40	–/65	state parliament
HES	11 (11)	35	–/65	state parliament
MW	7 (7)	35	68/68	state parliament
LS	9 (9)	35	–	state parliament
NRW	7 (7)	35	–/65	state parliament
RP	9 (9)	35	70/65	state parliament
SLD	8 (8)	–	–	state parliament
SAY	9 (9)	35	70/65	Bundestag
SAT	7 (7)	40	–	state parliament
SH	7 (7)	40	–	Bundestag
TH	9 (9)	35	70/65	state parliament

Abbreviations: BW = Baden-Württemberg, BAV = Bavaria, BER = Berlin, BB = Brandenburg, BRE = Bremen, HAM = Hamburg, HES = Hesse, LS = Lower Saxony, MW – Mecklenburg-Western Pomerania, NRW = North Rhine-Westphalia, RP = Rhineland-Palatinate, SLD = Saarland, SAY = Saxony, SAT = Saxony-Anhalt, SH = Schleswig-Holstein, TH = Thuringia.

a) Maximum age for members for non-professional judges (like university professors or lawyers) / maximum age for professional judges.

Source: my compilation based on state constitutions and laws on state constitutional courts; Ulrike Schmidt, *Altersgrenzen für Verfassungsrichter und die Dauer ihrer jeweiligen Wahlperioden im Bund und in den Ländern. (Wahlperiode Brandenburg, 4/2). Potsdam: Landtag Brandenburg, Parlamentarischer Beratungsdienst 2008.* <<https://nbn>

-resolving.org/urn:nbn:de:0168-ss0ar-52409-1> accessed 15 January 2020, , 2f.; Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 206.

(a) *Eligibility requirements*: Any possible nominee is checked beforehand as to whether he or she meets the eligibility requirements laid down in the state constitution or in the relevant act on the state constitutional court.<sup>27</sup> In addition to rules relating to the composition of a court (see below) three criteria can be distinguished in this respect (table 2). First – except for Baden-Württemberg<sup>28</sup> – constitutional justices must be eligible to enter a German parliament: that is, either for the Bundestag or for the state parliament (of course, they must not be member of a parliament). This means that nobody can become justice at a state constitutional court if he or she does not have German citizenship, has been sentenced to at least one year's imprisonment, or who has been legally declared as incapable of acting. Eligibility for the federal diet, the Bundestag, increases the number of possible candidates, while eligibility for a state parliament ensures that a justice has intimate knowledge of the laws of that state. Second, the Venice Commission found that “usually” constitutional justices were not allowed “to hold another office concurrently” in order to protect them “from influences potentially arising from their participation in activities in addition to those of the court”.<sup>29</sup> Similarly, in the German states we find the usual incompatibility rules stipulating that a constitutional justice may not hold other public offices (in the administration, in parliament, or in government).<sup>30</sup> It must

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27 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 467–469; Werner Reutter, 'Landesverfassungsgerichte in der Bundesrepublik Deutschland: Eine Bestandsaufnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 1, 9–13.

28 For Baden-Württemberg see: Werner Reutter, 'Richterinnen und Richter am Staats- bzw. Verfassungsgerichtshof Baden-Württemberg' (2019) 40 *Verwaltungsblätter für Baden-Württemberg* 485.

29 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <[https://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)> accessed 17 January 2020, 15.

30 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags*

be remembered, however, that state constitutional justices merely hold an honorary office. They are not formally employed by the state constitutional court and receive at best a modest expense allowance for their work. They make their living in their main profession (as a judge at another court, as a professor of law at a university, as a private lawyer in a law firm, or in another non-judicial job). In consequence, conflict of interests between the main profession and the public office as a justice at the constitutional court are possible, but seem to happen only rarely and are governed by specific rules of impartiality.<sup>31</sup> Third, in eleven states we find a minimum age of 35 years, and in four states 40 years. The minimum age is to ensure that justices have acquired sufficient life and professional experience when taking up a mandate at a constitutional court. As far as the maximum age is concerned we find three options: six states have no age limit at all, five for professional judges and another five for all groups.<sup>32</sup>

In addition to these formal requirements, we find informal criteria that might affect the selection of possible candidates like “experience in public life” (Saxony-Anhalt), “special knowledge in public law” (Bavaria), or commitment to democratic values (Bremen). If and in which way these informal criteria are referred to when recruiting a candidate is impossible to tell due to a lack of information.

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*Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739, <<https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf>> accessed 15 May 2019, 25–35. In some Länder the rules on incompatibility include European institutions or the Federal Constitutional Court as well.*

- 31 Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 471.
- 32 Ulrike Schmidt, *Altersgrenzen für Verfassungsrichter und die Dauer ihrer jeweiligen Wahlperioden im Bund und in den Ländern. (Wahlperiode Brandenburg, 4/2). Potsdam: Landtag Brandenburg, Parlamentarischer Beratungsdienst 2008.* <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-52409-1>> accessed 15 January 2020, 7.

Table 3: Branches of government with the right to propose candidates

	Executive <sup>a</sup>	Legislature <sup>b</sup>	Judiciary <sup>c</sup>
Baden-Wurttemberg	–	X	(X)
Bavaria	X	X	X
Berlin	–	X	–
Brandenburg	–	X	–
Bremen	–	X	–
Hamburg	X	X	–
Hesse	X	X	X
Mecklenburg-Western Pomerania	–	X	–
Lower Saxony	X	X	–
North Rhine-Westphalia	–	X	–
Rhineland-Palatinate	–	X	X
Saarland	–	X	–
Saxony	X	X	–
Saxony-Anhalt	X	X	–
Schleswig-Holstein	–	X	–
Thuringia	–	X	–

a) State governments.

b) Parliamentary parties, parliamentary committees, single MPs, council of elders, presidium of state parliament.

c) In Bavaria the chief justice of the Constitutional Court; in Hesse the chief justice of the highest regional court; in Rhineland-Palatinate the chief justice of the highest administrative court can propose candidates to the state parliaments; in Baden-Wurttemberg the state parliament can ask the state district court to draft a list with qualified candidates.

Source: my compilation based on state constitutions and laws on state constitutional courts; Werner Reutter, ‘Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern’ in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 211.

(b) *Selecting candidates*: The institutions that enjoy the privilege of proposing candidates must seek and find individuals who combine judicial expertise, individual integrity, and varying ideological views.<sup>33</sup> Without pre-

33 Julia Platter, *Die Wahl der Mitglieder des Verfassungsgerichts im Lichte des Artikels 112 Absatz 4 Satz 2 der Verfassung des Landes Brandenburg (Wahlperiode Brandenburg, 4/20). Parlamentarischer Beratungsdienst*. (Potsdam 2008). <<https://nbn-resolving.org>

justice to this challenging profile, the state parliaments have found almost all nominees fit to serve as state constitutional justices and have elected around 95 % of the candidates proposed to the sixteen parliaments. This confirms the assumption that selection trumps election (table 1). Thus, finding and picking a suitable candidate seems the hardest part of the appointment process. However, except for the eligibility requirements just discussed we find no rules around how to select and recruit candidates. The recruitment of state constitutional justices is neither regulated nor transparent,<sup>34</sup> but is instead governed by informal rules and takes place in the shadow of the upcoming vote in parliament. Hence, it is hardly a surprise that we find no studies that explore this pre-parliamentary phase of the appointment process of justices of state constitutional courts.<sup>35</sup>

(c) *Right to propose candidates*: According to the findings of the Venice Commission, the “most obvious difference among elective systems is the variety of authorities which have the task of proposing candidates for election”.<sup>36</sup> This is also true for the German states as far as the election of justices to constitutional courts is concerned. We find one common denominator, though: in all states the legislature (or parts thereof) enjoys the privilege of

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org/urn:nbn:de:0168-ssoar-52477-8> accessed 15 January 2019, 11; cf. also Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 485f.

- 34 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse)*, *Stellungnahme 16/2739*, <<https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf>> accessed 15 May 2019, 25–35; Christine Landfried, ‘Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit’ in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369.
- 35 On the recruitment of judges to the Federal Constitutional Court see Christine Landfried, ‘Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit’ in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369; Glenn M. Schramm, ‘The Recruitment of Judges for the West German Federal Courts’ (1973) 21 *The American Journal of Comparative Law* 691, 696–702.
- 36 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <[https://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)> accessed 17 January 2020, 5.

proposing at least some candidates. In five states the parliament has to share this privilege with the government and in two others with the judiciary (table 3). Due to a lack of information, it is impossible to tell whether the “most obvious difference” is one that really matters.

### *3 Parliamentary elections of justices to state constitutional courts: consensus democracy trumps majoritarian democracy*

According to the Venice Commission and compared to the appointment system, the election of constitutional justices “tends towards greater legitimacy”.<sup>37</sup> Not every scholar doing research in this field will endorse this message, notably because “elective systems” bring parties into the appointment process.<sup>38</sup> In this perspective, elections of justices by a parliament will increase the influence of political parties. In addition, Sascha Kneip has pointed out that a neutral and independent constitutional court can only be assumed if political minorities (in other words, the opposition in parliament) have a say in the elections. More tangibly, justices of constitutional courts have to be elected with a “supermajority” of at least two thirds of the members of parliament. Such a majority would grant the minority an institutionalized influence, increase the legitimacy of justices, and ensure judicial independence.<sup>39</sup> Not all elective systems by which state parliaments appoint constitutional justices live up to these standards.

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37 Venice Commission, *ibid.*

38 Christine Landfried, ‘Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit’ in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369; Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739*, <<https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf>> accessed 15 May 2019, 25–35; Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 460f.; Karl August Bettermann, ‘Opposition und Verfassungsrichterwahl’ in Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds), *Festschrift für Konrad Zweigert zum 70. Geburtstag* (J C B Mohr (Paul Siebeck) 1981), 723.

39 Sascha Kneip, ‘Verfassungsgerichtsbarkeit im Vergleich’ in Oscar W. Gabriel and Sabine Kropp (eds), *Die EU-Staaten im Vergleich: Strukturen, Prozesse, Politikinhalt* (3rd edn., Springer 2008), 631, 639f.

*Table 4: Elections of Justices to state constitutional courts: average majorities (including deputies)<sup>a</sup>*

	Number of elected justices <sup>b</sup>	Majority I (cast votes) <sup>c</sup>	Majority II (MPs) <sup>d</sup>	Governmental majority <sup>e</sup>	Required Majority <sup>f</sup>
BW	203	94.2	68.5	63.9	Most votes of all cast votes
BAV	616	92.1	75.8	62.3	Majority of cast votes
BER	37	85.7	79.2	64.1	Two thirds of cast votes
BB	36	N/A	79.8	61.6	Two thirds of all MPs
BRE	125	98.9	88.3	68.6	Absolute majority (> 50 %)
HAM	75	85.2	77.8	55.8	Majority of cast votes
HES	446	n/a	n/a	53.5	Two thirds MPs / simple <sup>e</sup>
MW	41	85.3	79.3	65.6	Two thirds cast
LS	195	93.1	74.7	56.7	Two thirds cast / absolute
NRW	187	93.7	79.6	53.7	Two thirds of all MPs
RP	330	98.1	98.0	57.6	Two thirds cast
SLD	49	n/a	n/a	n/a	Two thirds of all MPs
SAY	83	82.9	75.0	59.1	Two thirds of all MPs
SAT	58	89.7	79.2	55.9	Two thirds of all MPs
SH	30	91.6	85.9	65.4	Two thirds cast / absolute
TH	101	N/A	79.9	58.5	Two thirds of all MPs

a) Varying periods; in a number of cases the votes have not been registered; there are no data for Saarland; in Hesse a special committee elects some of the justices.

b) Number of elected justices.

c) Average share of votes cast in favor of elected justices/deputies.

d) Average share of MPs who cast their vote in favor of elected justices/deputies.

e) Average governmental majority. f) In Hesse a special committee of the state parliament elects five professional justices with a two-thirds majority; all MPs elect each term six justices; in both LS and SH two thirds of the votes cast and at least a majority of all MPs are required.

Source: own surveys and calculations; parliamentary record; [www.election.de](http://www.election.de).

As in many EU member states, only six German state parliaments elect state constitutional justices with at least two thirds of their members (table 4). Other states require a smaller proportion of votes. In five state parliaments two out of three cast votes are required, while in three states more than 50 % of the members of parliament is necessary. The parliaments of Baden-Württemberg, Bavaria, and Bremen elect justices with relative or simple majorities. In Hesse a distinction is made between the members of

the professional judiciary, who are elected by the election committee with a two-thirds majority, and the other justices, for whom a simple majority in parliament is sufficient.<sup>40</sup> These rules seem to confirm Sascha Kneip's assumption that an elective system does not necessarily "tend towards greater legitimacy". On the contrary, from a legal point of view at least, in six states a ruling majority of 51 % of all members of parliament can elect justices at the state's discretion. In other words, a government could "create" a constitutional court that mirrors its political preferences.

However, in the German states consensus democracy mostly triumphs over majoritarian democracy with regard also to elections of justices to constitutional courts. Three findings support this assumption. First, the legally prescribed majority does not tell the whole story about the influence of parties in opposition. In fact, minority parties have had a say in the election of justices of state constitutional courts even if only a simple or relative majority was required. For example, in Bavaria and Baden-Württemberg justices are customarily nominated and elected according to the principles of proportional representation. Thus, parties with only a few seats in parliament are also entitled to nominate candidates according to their share in the state parliament. This informal rule even allowed the AfD in Baden-Württemberg, Bavaria and Mecklenburg-Western Pomerania to have their candidates elected to the constitutional courts of these states even though this right-wing party failed to muster a "blocking minority" in these parliaments.<sup>41</sup> In addition, in Brandenburg, Bremen, or Berlin<sup>42</sup> parliamentary parties or "political forces" have been constitutionally granted the right to nominate candidates. Secondly, a "supermajority" normally entails

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40 Sigrid Koch-Baumgarten, 'Der Staatsgerichtshof in Hessen zwischen unitarischem Bundesstaat, Mehrebenensystem und Landespolitik' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 175, 183–185.

41 Michael Hein, 'Ausgrenzen oder integrieren? Verfassungsrichterwahlen mit oder gegen die AfD' (*Verfassungsblog*, 9 July 2018) <<https://verfassungsblog.de/ausgrenzen-oder-integrieren-verfassungsrichterwahlen-mit-oder-gegen-die-afd/>> accessed 15 February 2019; Werner Reutter, 'Richterinnen und Richter am Landesverfassungsgericht Mecklenburg-Vorpommern', (2019) 29 *Landes- und Kommunalverwaltung* 14, 16; Werner Reutter, 'Richterinnen und Richter am Staats- bzw. Verfassungsgerichtshof Baden-Württemberg' (2019) 40 *Verwaltungsblätter für Baden-Württemberg* 485, 485.

42 Werner Reutter, 'Richterinnen und Richter am Berliner Verfassungsgerichtshof' (2018) 28 *Landes- und Kommunalverwaltung* 489, 489–492; Werner Reutter, 'Richterinnen und Richter am Landesverfassungsgericht Brandenburg' (2018) 28 *Landes- und Kommunalverwaltung* 444, 445–448.

informal bargaining and horse trading among parties.<sup>43</sup> In other words, it leads to effects that such a requirement is supposed to make impossible because it undermines the democratic legitimacy of the appointment process. Finally, it should be noted that the support that constitutional justices receive in parliamentary votes is normally far higher than the formally required majority. On average, nearly 90 % of all votes cast and almost 80 % of all members of parliament supported the justices who were eventually appointed to the constitutional court (table 4). This is not only well above any required supermajority but also exceeds by far the majorities on which state governments could rely. These findings confirm Gärditz's assumption that a "one-sided partisan leaning"<sup>44</sup> of state constitutional courts by a governmental majority did not take place and show that parties in opposition have a say in these processes even if a simple or relative majority is sufficient. To use Arend Lijphart's terms we can conclude that, in these elections, consensus democracy trumps majoritarian democracy.<sup>45</sup>

#### *4 Term length, re-election, end of office, and dismissal: independence trumps everything*

In liberal democracies the rule of law needs independent judges. Justices have to act freely<sup>46</sup> "from improper pressures", because it is "emphatically the province and duty of the judicial department to say what the law is".<sup>47</sup> This was the reason why Alexander Hamilton saw no harm in granting justices of the U.S. Supreme Court a tenure for life. Such a life tenure would ensure the independence of justices serving on the highest court in the United States and thus make the "least dangerous branch of government" an effective check on the executive and legislature. Nevertheless, life tenure

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43 Julia Platter, *Die Wahl der Mitglieder des Verfassungsgerichts im Lichte des Artikels 112 Absatz 4 Satz 2 der Verfassung des Landes Brandenburg (Wahlperiode Brandenburg, 4/20)*. *Parlamentarischer Beratungsdienst*. (Potsdam 2008). <<https://nbn-resolving.org/urn:nbn:de:0168-ss0ar-52477-8>> accessed 15 January 2019, 15.

44 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 465.

45 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999).

46 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010), 51.

47 *Case Marbury vs. Madison*, 5. U.S. (1 Cr.) 137, 177 (1803).

comes with a qualification because according to Art. 3 Sect. 1 of the U.S. Constitution the justices of the U.S. Supreme Court “shall hold their Offices during good Behavior.” The lawmakers in the German states did not follow Hamilton’s advice. They wanted to balance the aforementioned principles of judicial independence and democratic accountability in a different manner. According to their views, the rule of law requires continuity, judicial experience, and stability, while the democratic principle entails frequent renewal and a “regular refreshing” of the judiciary.<sup>48</sup> Within this spectrum, legal norms and political practice in the German states show considerable differences with regard to the terms in office, the possibility of re-election, and to the ways in which justices of constitutional courts can be impeached and removed from office.

No state constitutional justice is elected for life. In the German states there is always a way other than death to end a tenure at a constitutional court. The parliaments of Bremen, Bavaria, and Hesse give precedence to democratic imperatives and elect all or at least a large number of justices of the constitutional court at the beginning of each legislative term. In the other states, the term of office of constitutional court justices ranges from between six and twelve years. Re-election is ruled out in Berlin, in Mecklenburg-Western Pomerania, and in Brandenburg. In six states a justice can be re-elected once. In the other states justices can be re-elected unlimited times. The option to be re-elected as a justice to a constitutional court is mostly viewed critically. In this perspective, the possibility of re-election would encourage opportunism and increase the influence of ruling parties.<sup>49</sup> However, there is no evidence supporting such an assumption. According to Gärditz<sup>50</sup> the re-election of constitutional justices has yet not triggered any conflicts at all. If a re-election is possible, many justices use this privilege. In some cases justices served for almost 30 years at a court.

From a legal point of view, the tenure of a constitutional justice ends (except by death) when the maximum age has been reached, the conditions of

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48 Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 464.

49 Sven Leunig, *Die Regierungssysteme der deutschen Länder im Vergleich* (Barbara Budrich 2006), 206; Martina Flick, *Organstreitverfahren vor den Landesverfassungsgerichten: Eine politik-wissenschaftliche Untersuchung* (Perter Lang 2011), 50.

50 Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 465.

eligibility for election are no longer fulfilled, the term of office has expired, a justice has requested his or her dismissal or a professional judge retires from his or her main job. All these options raise no problem. The only crucial issue in this context is when a justice is removed from office. According to the Venice Commission a “dismissal should involve a binding vote by the court itself”.<sup>51</sup> In the German states we find various regimes ruling on this issue. In Bavaria and Bremen, constitutional justices cannot be removed from office, at all. In Baden-Württemberg, the federal constitutional court has to make the final decision on the removal of a state constitutional justice. In the other states the state constitutional court is always effectively involved either by posing the request or making the final decision on the dismissal. Reasons for such an impeachment include: violation of official duties, permanent incapacity for service, a sentence of six months or more in prison, cooperation with the Ministry of State Security or the National Security Office of the former GDR, or a violation of the constitution. To the author’s knowledge no trial for impeachment has ever occurred. In addition, the legal provisions already indicate that a dismissal cannot be used as a political instrument. In almost all states, the constitutional court itself decides whether a justice is to be removed from office. And in most cases, an application from another institution is a prerequisite to start a trial for impeachment. Overall these findings show that judicial independence is guaranteed for the justices of state constitutional courts. Even though the states employ different rules in this respect, judicial independence trumps democratic principles as soon as a justice has entered office.

### *5 Demographic makeup of state constitutional courts*

Statistically speaking, justices in German state constitutional courts are male, judge at a specialized court, and are in their late fifties. But what does that mean? In fact, it is debatable whether a constitutional court has to be representative and somehow mirror “basic salient social traits” in its de-

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51 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010). CDL-AD(2010)004-e. <[https://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)> accessed 17 January 2020, 21.

mographic makeup.<sup>52</sup> The Venice Commission, too, found that the “representation of minority groups on the bench” seemed not to be a “common goal” in the 40 countries included in the study of the commission. Only women, who do not form a minority group in the first place, have been mentioned in this context. Things are different with regard to the American state supreme courts. Their demographic makeup should somehow reflect the “demographic makeup of the populace”<sup>53</sup> and include specific minorities.<sup>54</sup> In Germany we find only a few voices supporting such a call. Christine Landfried and Rosemarie Will voiced concern about the lack of representativeness and the demographic makeup of constitutional courts. They requested that the composition of constitutional courts in general and state constitutional courts in particular should also take into account the social and professional background of justices.<sup>55</sup> Yet legal stipulations fail to address such considerations. Instead, we find three dimensions that underlie the composition of state constitutional courts: age, gender, and profession (table 5).

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52 Matthias Kumm, ‘On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019), 281, 286.

53 George Alan Tarr, *Judicial Process and Judicial Policy-Making* (5th edn., Wadsworth 2010).

54 Gregory L. Acquaviva and John D Castiglione, ‘Judicial Diversity on State Supreme Courts’ (2010) 39 *Seton Hall Review* 1203.

55 Christine Landfried, ‘Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit’ in Robert Chr. van Ooyen and Martin H. W. Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn., Springer 2015), 369, 372; Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739*, <<https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMST16-2739.pdf>> accessed 15 May 2019, 5.

Table 5: Composition of the judiciary of state constitutional courts by gender, main occupation and age (in percentage; without deputies)

	# of justices <sup>a</sup>		Main professions					Average age on entering office
	Total	%	Judge at a court	Professor of law	Lawyer	Non-judicial occupation <sup>b</sup>	No data <sup>c</sup>	
			%	%	%	%	Total	
BW	92	17.4	34.8	14.1	13.0	38.0	0	54.9
BY	616	11.2	56.3	1.5	23.9	15.4	18	53.9
BB	30	33.3	43.3	23.3	13.3	16.7	1	49.3
BE	37	40.5	45.9	13.5	40.5	0.0	0	51.2
HB	18	33.3	44.4	38.9	16.7	0.0	0	55.7
HH	29	24.1	65.5	0.0	27.6	10.3	1	57.8
HE	66	15.2	51.5	7.6	21.2	9.1	7	54.0
MV	18	16.7	66.7	16.7	11.1	5.6	0	50.1
NI	52	17.3	59.6	19.2	11.5	7.7	1	56.5
NW	54	13.0	64.8	18.5	14.8	1.9	0	54.7
RP	73	11.0	50.7	8.2	15.1	24.7	1	55.4
SL	49	10.4	55.1	16.3	26.5	2.0	0	50.5
SN	40	12.5	60.0	27.5	2.5	10.0	0	53.1
ST	29	37.9	44.8	13.8	0.0	34.5	2	54.0
SH	14	28.6	78.6	14.3	7.1	0.0	0	54.9
TH	50	22.0	38.0	22.0	32.0	8.0	0	52.5
All	1267	15.5	53.5	8.8	20.5	14.8	31	53.0

a) Without deputies; justices who have been elected several times are only counted once in the statistics.

b) A justice belongs to the group of non-judicial justices (*Laienrichter*) if he or she has been assigned to this group by the electoral body.

c) The number of justices who could not be assigned to any occupational group.

d) Average age when taking up office for the first time.

Sources: my compilation; my survey; parliamentary records; Deutscher Richterbund (ed), *Handbuch der Justiz*, (C F Müller 1953 et seq.); Werner Reutter, 'Verfassungsrichterrinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 222.

*Age:* The average age of constitutional justices is around 53 years when they take office for the first time. This is well above the statutory minimum age set at 35 or 40 years in the German states for justices at constitutional courts. Only in Brandenburg are justices on average younger than 50 years old on entering office.<sup>56</sup> On average, justices leave after about nine years.

*Gender:* Female justices are a minority in constitutional courts. There are just two state constitutional courts with a gender quota. The laws on constitutional courts in Berlin and Brandenburg stipulate that each court has to have at least three male and three female justices (out of nine). In two other states (Lower Saxony and Saxony-Anhalt) such a quota is not obligatory but merely recommended. With regard to the composition of state constitutional courts the quota has been successfully applied in Berlin and Brandenburg. In both courts the share of female justices, at 15 %, is well above the average share of women in all constitutional courts. So far, female justices have only rarely been in a majority in a state constitutional court.<sup>57</sup> In terms of representativeness this can only be marked down as a failure.

*Main professions (judges, professors of law, lawyers, and non-judicial professions):* According to Ernst-Wolfgang Böckenförde, judicial expertise should count as the only criterion when appointing justices to the federal constitutional court.<sup>58</sup> The legislators in the states viewed this assumption (at least partly) differently. Even though all state constitutional courts are required to have members whose main profession is as a justice at a court, they show a diverse makeup with regard to appointees' main professions.

- *Professional judges:* From a legal point of view there are just two states in which professional justices have to have a majority in the constitutio-

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56 Astrid Lorenz, 'Das Verfassungsgericht des Landes Brandenburg als politisiertes Organ? Möglichkeiten und Grenzen politischer Einflussnahme' in Werner Reutter (ed), *Landesverfassungsgerichte: Entwicklung – Aufbau – Funktionen* (Springer 2017), 105, 116.

57 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 487.

58 Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa: Studien zur Verfassungslehre, Verfassungstheorie und Rechtsphilosophie* (Suhrkamp 1999), 177; for the following see also Werner Reutter, 'Verfassungsrichterinnen und Verfassungsrichter: zur personalen Dimension der Verfassungsgerichtsbarkeit in den Bundesländern' in Werner Reutter (ed), *Verfassungsgerichtsbarkeit in Bundesländern: Theoretische Perspektiven, methodische Überlegungen und empirische Befunde* (Springer 2020), 203, 221–224.

nal court: Mecklenburg-Western Pomerania and Saxony. In the first of these two states, four out of seven and, in the second, five out of nine justices of the constitutional court have to be justices at another court. Yet in reality, and with the exception of Baden-Württemberg, in all state constitutional courts professional judges make up the largest group. In Bavaria, Mecklenburg-Western Pomerania, Saxony, and Schleswig-Holstein their share is well above 50 %. Comparatively poorly represented are professional judges in Baden-Württemberg and Thuringia. In the Bavarian constitutional court only professional judges decide important proceedings.<sup>59</sup> Due to their main profession judges of special courts are assumed to prefer a legalistic, positivist, and case-oriented approach which might not always comply with the functional needs of constitutional adjudication.<sup>60</sup>

- *Professors of law*: University professors of law should take a different stance on legal issues than the other groups represented in constitutional courts. They are presumed to refer to basic values and to show more expertise in general constitutional issues than do judges or lawyers.<sup>61</sup> But this group remains across all courts a minority. On average, they represent just 7 % of all constitutional justices (table 5). They are particularly poorly represented in Hamburg and Bavaria, where just nine university professors were elected to the constitutional court between 1947 and 2018. Disregarding this outlier, the share of university professors in constitutional courts would reach around 18 %.
- *Lawyers*: According to Gärditz,<sup>62</sup> lawyers interpret law from the perspective of specific cases. They have never made up a majority in any state constitutional court. In Saxony-Anhalt they have not been represented at all and in four other states only for a short period. However, in Berlin, Bavaria, and Thuringia lawyers constitute the second largest group after professional judges.
- *Non-judicial occupation*: With the exception of Schleswig-Holstein, Bavaria and North-Rhine Westphalia (since 2017) all state constitutional courts can (and some must) have a number of judges without a law

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59 Klaus F. Gärditz, 'Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit' in Peter Häberle (ed), 61 *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 477.

60 Klaus F. Gärditz, *ibid.*, 449, 477.

61 Klaus F. Gärditz, *ibid.*, 449, 479.

62 Klaus F. Gärditz, *ibid.*, 449, 484.

degree. From a legal point of view, this type of judge has even managed to muster a majority in five state constitutional courts. Yet, on average, only about 17 % of justices at constitutional courts have not graduated from a German law school. The courts of Berlin, Bavaria, and Schleswig-Holstein are made up only of justices who can also serve as a judge at another court. It is difficult to describe the role these justices play in constitutional courts. While Will and Harms-Ziegler,<sup>63</sup> former constitutional justices in Brandenburg, found cooperation with these justices “positive” and enriching, Gärditz<sup>64</sup> believes the influence of these justices is insignificant.

According to Gärditz,<sup>65</sup> the demographic makeup of state constitutional courts shows “deficits”. He finds that state constitutional courts are dominated by professional judges, only have a few female justices and even fewer young justices, not to mention the rarity of lawyers as a species and the fact that constitutional justices without a law degree play hardly any role in courts. Yet the data presented in this article paint a more nuanced picture. The different groups show varying shares in the state constitutional courts. Thus, even though it is difficult to tell how far the varying demographic makeups have affected decision-making in these courts we can still conclude that the heterogeneous picture created by the makeups of state constitutional courts might elicit a more pluralist understanding of German constitutional adjudication.

## 6 State constitutional adjudication and justices: tentative conclusions

The findings presented in this article lead to three basic conclusions.

First, with regard to the election of justices to and the composition of state constitutional courts we receive a colorful picture. The selection of candidates, the required majorities, the composition of the benches, and the

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63 Rosemarie Will, *Stellungnahme zur öffentlichen Anhörung der Kommission zur Reform der nordrhein-westfälischen Verfassung (Verfassungskommission) des Landtags Nordrhein-Westfalen am 11. Mai 2015 (unter Mitarbeit von R. Plöse), Stellungnahme 16/2739*, <[https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokument\\_enarchiv/Dokument/MMST16-2739.pdf](https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokument_enarchiv/Dokument/MMST16-2739.pdf)> accessed 15 May 2019, 6.

64 Klaus F. Gärditz, ‘Landesverfassungsrichter: Zur personalen Dimension der Landesverfassungsgerichtsbarkeit’ in Peter Häberle (ed), *61 Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2013), 449, 473.

65 Klaus F. Gärditz, *ibid.*, 449, 492f.

way someone's position as a justice might end can hardly be boiled down to one model or to a consistent ideal type like an "elective system". Each state has established its own rules and patterns. In this regard, the state constitutional courts mirror a basic idea of federalism: pluralism. At the same time, this also means that state constitutional courts are not only basic pillars of subnational political systems but that they also inject federal ideas into the judicial system.

Second, the appointment of justices to German state constitutional courts reflects the dual status of these courts. This statement holds true along all the dimensions examined in this article. We always find that democratic accountability has somehow to reflect judicial independence. Yet the balance between these two principles is struck in varying ways and to different degrees depending on the dimension. One important lesson of this analysis is that we should hence not jump to conclusions when we qualify such a system.

Third, what all appointment processes have in common is their dependence on a vote by a state parliament. Even though in some states the executive and the ruling party have gained an influence that can give rise to criticism, there is no evidence for a one-sided party politicization of state constitutional courts. On the contrary, even in those states where a simple majority is sufficient the election of justices has rather complied with the logic of consensual democracy. It remains to be seen whether these formal and informal rules will still work in times of right-wing populism and linked with a party that openly challenges the principles of parliamentary democracy in Germany.