The Problem Is Not Politicization

Comparative Lessons From Judicial Elections Gone Wrong in Germany and Brazil

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29.05.2026 doi: 10.59704/52af3ea37d761e31

Last year, the candidacy of Frauke Brosius-Gersdorf for the German Federal Constitutional Court (FCC) collapsed amid an intense wave of public controversy and a conspicuous failure of coordination within the Christian Democratic Union (CDU) during the parliamentary vote. Last month, the presidential nomination of Jorge Messias to the Brazilian Federal Supreme Court (STF) was rejected by the majority of the Brazilian Federal Senate. This was historic: the first such rejection in the last 132 years. If the German episode surprised by its disarray, the Brazilian one shocked by its novelty.

The two cases differ in their details. Brosius-Gersdorf was reduced to her academic position on abortion, while Messias fell victim to a right-wing-dominated Congress unwilling to confirm another president ally in a court already under fire, given recent controversies about the ethical conduct of several of its members and its political influence.

Yet both cases have something important in common. Both elections failed after politicization dynamics destabilized long-standing informal political institutions which have historically enabled the justices' successful election. The problem, however, was not politicization as such – court nominations have always required political compromise. The problem rather lies in the Brazilian intuition of "*politicagem*": the political subordination of judicial selection to predatory forms of overpromoting public performance.

Politicized Parliamentary Conventions

Gretchen Helmke and Steven Levitsky define informal institutions as "socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels" (p. 5). In constitutional contexts, they may take the form of conventions: practices that generate normative expectations, bind in distinctive ways, and may nonetheless be crucial for sustaining democratic structures.

But the existence of such conventions does not imply de-politicization. Parliamentary practices – such as the election of judges to the highest courts – are structured by politicized frameworks. Norms themselves have, as Neil MacCormick put it, an "arguable character": they are open to contestation in their interpretation and application. More importantly, parliamentary constitutional conventions often provide only a broad framework that requires further political operationalization. Their functioning depends on organization, compromise, and negotiation. This has been the case in both Brazil and the Federal Republic of Germany. The expectation that judicial nominees would ultimately be approved has always presupposed the political viabilization of candidacies – with significant differences during authoritarian periods in Brazil.

Indeed, high-stakes political compromise has long been part of the ordinary functioning of judicial nominations in both countries. In Germany, the election of constitutional judges depends on a two-thirds majority in the Bundestag or the Bundesrat, making cross-party agreement indispensable. In Brazil, although the Constitution requires only an absolute majority in the Senate, 22 out of the 28 approved nominations for the STF under the current constitution passed with a majority of more than three-fifths of senators – the same threshold required for constitutional amendments (Art. 60, par. 2 of the Brazilian Constitution).

Such politicized parliamentary conventions have endured largely due to persistent majoritarian preferences. They may partly be framed as expressions of

constitutional culture, but this alone does not catch the full picture. There are at least two further explanations for this. First, there have long been compelling institutional and political reasons to avoid transporting political turmoil into judicial selection. Not only the pursuit of publicly esteemed and independent judiciaries may have played a role in this. The strategic politicization of other institutions or actors – rather than judges – may have been of more advantageous political use. Second, the maintenance of these models has presupposed a certain degree of adaptability over time in order to secure viable majorities. The German model, for example, eventually incorporated nominations from the Alliance90/The Greens after the party became an established political force.

Politicization Gone Wrong?

These, however, were not the kinds of politicization that came to jeopardize the candidacies of Brosius-Gersdorf and Messias.

In the case of Brosius-Gersdorf, politicization both stemmed from and contributed to reductionism. Her candidacy came to be largely reframed as a public dispute over her stance on abortion. What are often rather discreet processes of judicial selection for the FCC became unprecedentedly mediatic, and, often based on excerpts of Brosius-Gersdorf's academic account of abortion, public discussion gravitated toward a black-and-white assessment of her suitability. Still, the failure of political organization of the CDU in the parliamentary process proved ultimately decisive for the gradual burial of her candidacy. It was the combination of reductive mediatic politicization and shortcomings in parliamentary coordination that led to the collapse of the candidacy. Before a second attempt at voting took place, Brosius-Gersdorf withdrew.

The Messias' case, in turn, reveals more ambivalent forms of politicization. On the one hand, the Senate can be seen as declining to continue a pattern consolidated under Bolsonaro and Lula. It primarily set a stop on electing allies of the current president. On the other hand, the predominantly right-leaning Senate also signaled how it plans to play the election game this year by making it clear whom one should please to elect a judge for the STF. The politicization of the judiciary became an electoral matter for all political actors. The Senate's problem with Messias was not really that he lacked "notable legal knowledge and unblemished reputation" (Art. 101 of the Brazilian Constitution). The problem was that he was Lula's candidate. Messias' performance during the Senate hearings – including the emphasis on his evangelical convictions – can be read as an attempt to engage with the recent increased politicization of religion, though ultimately without success. His rejection sustains, and perhaps reinforces, broader instrumental narratives about a politically exposed STF, which has recently been in the spotlight regarding the conduct of its members and has been discussing the adoption of a code of ethics.

These episodes might seem to invite a straightforward conclusion: that judicial nominations need depoliticizing. The German experience, in particular, has often been praised as a role model of cross-party agreement that enhances both judicial independence and social perceptions of legitimacy of the Court. The Brosius-Gersdorf episode put pressure on exactly that model by creating uncertainties over how future selections of FCC judges will be conducted – and which candidates will be willing to subject themselves to potentially intense mediatic exposure. Yet the problem in neither case was politicization as such. Rather, specific pathologies of politicization shaped their problematic outcomes. In important respects, both cases fall under the Brazilian intuition of *politicagem*.

Politicization Meets Politicagem

The Brazilian term *politicagem* (similar to "politicking") refers, in a pejorative sense, to forms of self-serving confusion between electoral politics and public policies (EIRÓ, 2017, p. 140). The term is not without conceptual difficulty, as the strong division it presupposes is rarely clear-cut in political practice. Political actors will often pursue public policies with an eye to their broader political positioning, which is ultimately decisive for electoral achievements. Political competi-

tion, after all, is essential to democratic life and cannot be wiped away from the reality of political action.

Still, *politicagem* captures an important intuition: that certain domains of political decision-making may call for intensive political engagement while remaining relatively preserved from predatory forms of over-promoting their own public performance. Judicial nominations seem to belong to this category insofar as they build one of the most central instances for the constitution of judicial independence and public trust in the judiciary.

The failed judicial selections of Brosius-Gersdorf and Messias became victims of *politicagem* in diverse senses. In Germany, far-right political actors consciously contributed to delegitimizing perceptions of the FCC by seeking political credit through a highly aggressive campaign. A campaign against both a candidacy and a judiciary that was feared to become unusually vulnerable to politicization. Individual CDU parliamentarians also opted to score points in public positioning by going public and surfing the electioneering wave of framing Brosius-Gersdorf's selection as a vote (of conscience) for or against abortion. In Brazil, *politicagem* surrounds a broader and more multipolar politicization of the judiciary for electoral purposes. This phenomenon is certainly multifactorial – and also connected to the questionable public political positioning of some STF justices themselves. In some ways, court packing increasingly risks becoming part of the ordinary political – and electoral – agenda. In this sense, *politicagem* may already have had a weighty milestone in the presidential pattern (under Bolsonaro and Lula) of nominating persons publicly perceived as close political allies. *Politicagem* then kept going with the Senate's dramatic break with a centenary Brazilian practice.

In both cases, truth be told, political conventions ultimately failed because of failures in political coordination – failures co-conditioned by *politicagem*. The primary loser is the judiciary; further losers are yet to be determined in the course of political developments. The virulent character of *politicagem*, already captured in Rubem Braga's criticism of Getúlio Vargas in 1952, seems simply to have found new forms of survival:

> *"Is politicagem such a strong and terrible vice that wears down this sensitivity, destroys that minimum of prudishness, and reduces the honor of others – and ultimately one's own – to a mere card in the deck of maneuvers and conveniences?" (translated by me).*

Conclusion

Court nominations will therefore continue to highly depend on politicization. They will further require cross-party compromise, negotiated support, and plural conceptions of the kind of judges a court – be it the STF or the FCC – ought to have. Electing judges is a political task, and the existence of courts that combine public legitimacy, high legal qualification, and judicial independence is itself a political achievement. At the same time, judicial nominations may benefit from less *politicagem*. The selection of judges should not become an arena for the pursuit of cheap political credit. Courts depend on public trust – and that trust risks being eroded when the political practices surrounding their composition become primarily instruments of short-term electoral advantage.

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SUGGESTED CITATION

Pereira, Diego Platz: The Problem Is Not Politicization: Comparative Lessons From Judicial Elections Gone Wrong in Germany and Brazil, Verfassungsblog, 29.05.2026, doi: 10.59704/52af3ea37d761e31.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260529-173455-0.