Enhancing the selection process of European Court
of Human Rights judges through multi-institutional dialogue

SEMINAR MARKING THE 15 YEARS OF THE ADVISORY PANEL'S WORK
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Introductory Talk

Lord Jonathan Mance,
Former Justice and Deputy President of the Supreme Court of the United Kingdom

1. It is a pleasure to give this introductory talk to celebrate the 15th anniversary of the Panel Consultatif of the Council of Europe. My immediate credentials are, I suppose, that I served for ten years from 1 March 2010 on the therefore (very slightly older) Article 255 Committee which scrutinizes the suitability of candidates to be judges or advocates general at the Cour de Justice in Luxembourg. Formed practically at the same time, there are some notable differences between the Article 255 Committee and the Panel Consultatif.

2. But let us start with what they have in common. The manner in which judges are appointed, nationally and internationally, has been of significance for as long as people have understood the role of judges, or, more colloquially, what judges actually do. # There are periods of history, when people did not always understand this, or, in so far as they did understand, sought to suppress it. # Montesquieu's famous description of English judges as no more than « la bouche de la loi » is (rightly or wrongly) often cited as illustrating this. # So too the equally famous Article 5 of the French Code civil, whereby « Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises. » # English judges played along with this idea of law as mechanics, by speaking of the Saxon origins of the common law, which was merely revealed from time to time by judicial decision. # Originalist thinking in America also believes that judges must interpret the Constitution according to an understanding fixed for all time in the 18th century. # On these approaches, what judges do or who they are does not much matter, because it is all already decided by history or the legislator.

3. However, for most of us, and certainly for UK judges, the idea that judges are not law-makers is a fairytale – to quote a well-known phrase of Lord Reid's in 1972[1]. The admirable development of modern constitutional courts, and the significance of that development in countries like Germany where constitutional judges play a foundational role in securing and under-pinning democracy, has made us very familiar with the judicial power to strike down ordinary legislation, though that of course is done in the name of giving effect to the constitution. The more powerful and certainly more active tool in every modern judge's armoury is the power of interpretation, whether it be of a constitution or of an ordinary law. And in exercising this power, judges frequently draw on what they identify as fundamental values and principles of the society – national or international - which they represent and on presumptions that the legislature must have intended to preserve these. It is in this way that judges in the United Kingdom, as in other jurisdictions, exercise what is on a day-by-day basis their most powerful quasi-constitutional role.

4. But the public acknowledgement by judges of the power of the judicial role - and its impact on legislators, government, press and public – these lead inevitably to the question of judicial legitimacy. Who are these judges? Who judges the judges? How are they appointed? How re we to assess their independence of mind and spirit? Because judicial independence cuts both ways. It encourages objectivity of thought and decision. On the other hand, if judges whose thinking is politically oriented or otherwise lacking in objectivity obtain high judicial office, they may be there for a long time, and there may be no means of challenge to their tenure. Without true judicial independence, the very existence of Law, and certainly the rule of law is itself challenged. If judges become the slaves of ideology or political thinking, then their very independence becomes a danger. The law risks becoming whatever the particular ideology or political theory dictates, and may vary from case to case, undermining the whole concept of law and the certainty, consistency and equality for which we value law.

5. So who judges are and how we appoint them is central to the concepts of law and of rule of law. Yet, all too often, the power to appoint has in the past been seen as

[1] Lord Reid, a Law Lord for the (surely record) period of 27 years - from 1948 to 1975.

an executive or political prerogative. And this attitude was particularly prevalent and enduring in relation to international judicial appointments. Until quite recently such appointments were few in number – the ICJ being the most significant and remaining to this day a court where individual governments strive mightily to have their preferred choices elected by the group of countries to which they belong. But the emergence of new courts at a supra-national level with day-to-day impact on the lives of citizens as well as governments has led to the realisation of the importance of competent and reliable judges of a calibre and character appropriate to their role of administering justice across a range of jurisdictions.

6. I was elected as first chair of the Council of Europe's Consultative Council's Council of European Judges in 2000, sitting many times in this or a very similar room in this building. It is no accident that far the largest section of our very first Opinion No. 2001 involved an examination of and suggestions regarding methods of appointment. We identified a large diversity of methods by which judges are appointed[2], albeit evident unanimity that appointments should be "merit-based".

7. In that light, we recommended that

> *the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency*.

and we went on to say that

> *the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority - with substantial judicial representation chosen democratically by other judges - pointed in a general direction which the CCJE wished to commend.*

[2] We said: *The various methods currently used to select judges can all be seen as having advantages and disadvantages: it may be argued that election confers a more direct democratic legitimacy, but it involves a candidate in a campaign, in politics and in the temptation to buy or give favours. Co-option by the existing judiciary may produce technically qualified candidates, but risks conservatism and cronyism (or "cloning") – and would be regarded as positively undemocratic in some constitutional thinking. Appointment by the executive or legislature may also be argued to reinforce legitimacy, but carries a risk of dependence on those other powers. Another method involves nomination by an independent body.*

8. In para. 56 we also said:

> *The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts. The Council of Europe and its institutions are in short founded on belief in common values superior to those of any single member State, and that belief has already achieved significant practical effect. It would undermine those values and the progress that has been made to develop and apply them, if their application was not insisted upon at the international level.*

Three years later in 2003 we underlined this specifically in our fifth opinion - on appointments to the ECtHR.

9. Consciousness of the expanding activity and significance of EU law and Human Rights law meant that discussion about ways of ensuring judicial suitability were already current at that time. The ultimately abandoned draft Constitution for Europe dated 18 July 2003 provided for an advisory body.[3] This was followed in 2009 and 2010 first by Article 255 of the Treaty of Lisbon 2009 and then by the establishment of the Panel Consultatif. The United Kingdom had recently formalised its own, already non-political system of judicial appointments was a strong protagonist of the introduction of Article 255. The activity of the Article 255 Committee commenced on 1 March 2009, and the Panel Consultatif began work shortly afterwards in Strasbourg.

10. Even under the prior Treaties, judges and advocates general at the Court of Justice had to be appointed by common accord of those Governments, but now such common accord had to follow consultation with the Article 255 Committee.[4] This means following receipt and consideration of the Committee's opinion (or even in an exceptional case after hearing from the President of the Committee in person). The process is that, when there is a vacancy on the Court, the relevant Member

[3] Article III-262.
[4] By decision of the European Council dated 10 February 2010.

State proposes a single candidate who is interviewed in the case of a first appointment, but merely reviewed on paper in the case of a renewal.

11. Since the appointment of a judge or advocate general requires unanimity, an adverse opinion of the Article 255 Committee is inevitably fatal for a candidacy. No Member State is going to be able, or has ever been able, to obtain any – let alone the necessary unanimous - support for overriding an adverse Committee opinion, and the attempt received no support from any other Member State. One State once sought to challenge one of our rejections in the meeting of Ministers. No single other State supported the challenge.

12. Both the Article 255 Committee and the Panel Consultatif have basically the same role, that is to ensure so far as possible that those appointed to their two Courts have the expected qualifications. In the case of the Court of Justice, that means under Article 253 TFEU that they are

> *"persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence"*

and under Article 21(1) of the ECHR that they are

> *"of high moral character and …. possess the qualifications required for appointment to high judicial offices or …. are jurisconsults of recognised competence*".

13. It would not be fruitful to try to identify any real differences in practice between "independence beyond doubt" and "high moral character" or between "highest" and "high" office. What is important is that neither the Committee nor the Panel has ever viewed its role as a box-ticking exercise. The Article 255 Committee from the outset emphasised its role under the European Council's Rules of giving an opinion upon the *suitability* – not just the formal qualifications - of any candidate for appointment. Both it and the Panel Consultatif have been very thoughtful and precise in their development – the fleshing out - of particular criteria which bear or may bear on suitability. Their impressive efforts in this respect demonstrate their awareness of the importance of trust in the two Courts which they serve.

14. There are however important differences between the positions and roles of the Committee and the Panel, some of which are probably already apparent. The first is the apparently greater degree of control which the Article 255 Committee has over the final decision-making process by the Governments of Europe. The second is the difference in procedures which requires the Article 255 Committee to interview new candidates, but offers the Panel Consultatif no such facility. Both bodies have input from the nominating governments, explaining their procedures and choice. Both can elicit further information by questioning of governments. Both may use public sources or sometimes receive gratuitously volunteered comments or material from outsiders. But the face-to-face interview which the Article 255 Committee conducts was, we found, a significant opportunity to probe and inform. An Article 255 interview of any new candidate lasts one hour, during the first ten minutes of which the candidate presents him/herself. During the interviews the candidate's training, profession experience, reasons and abilities are tested, particularly on main aspects of EU law. for choosing a candidate. Some remarkable information emerged from some of the interviews, even including (though unusually) direct evidence as to the extent to which we could rely on a candidate's integrity.

15. In contrast the Panel Consultatif cannot interview. It advises on documents. Its advice is required to be unanimous or by five out of its seven members (so that it can happen that it is unable to give any advice). But, when it does advise, that advice goes to a body which can and does interview – the Committee on the Election of Judges to the European Court of Human Rights (AS/Cdh), a Committee of the Council of Europe's Parliamentary Assembly ("PACE"). This interviews each of the three candidates in person, though for only 30 minutes, during the first five of which the candidate introduces themselves, and scrutinises their CVs before making a recommendation to the Assembly concerning the qualifications of these candidates. The Assembly then appoints not by unanimity, but by absolute majority in a first round or, if the matter goes to a second vote, by taking simply the candidate with the most votes.

16. Neither the Assembly Committee nor the Assembly itself is therefore bound in law or in practice to follow the Panel Consultatif. There could evidently be scope for

canvassing of political opinion, which may differ from the Panel's original paper assessment. Initially, there may even have been some resistance on the Assembly's part to the Panel Consultatif's role. But happily, I understand, a much more harmonious relationship has been worked out. The Assembly has rejected a suggestion that would have integrated a representative of the Panel Consultatif in Committee interviews with candidates. But it has resolved that the Chairperson of the Committee shall invite the Chairperson or a representative of the Advisory Panel to explain the reasons for the Panel's views on candidates, during the briefing sessions scheduled before each set of interviews.[5] And in 2022 the Panel and Committee have held at least one joint meeting when they discussed the interpretation of the eligibility criteria in Article 21 of the ECHR. The mutually supportive inter-relationship between different bodies of the Council of Europe which has developed is something about which the Panel Consultatif can be proud.

17. A third difference is that the Article 255 Committee has no choice between candidates. It sees one candidate at a time. It does not know whether, if it rejects that candidate, the next will be just as bad or worse. The Panel Consultatif and after it the Assembly has the advantage of a choice between three candidates, and the Council of Europe had made sure that the choice is a real one, by giving the Panel the role (following a confidential procedure) of deciding whether it considers that all the candidates have the qualities required under Article 21(1) of the Convention.

18. There was a brief moment when it appeared that the Article 255 panel might acquire a limited role in deciding between two candidates. That moment occurred when expansion of the General Court was being decided. The Court did not require a doubling in size, so there would have had to be some form of selection process. But smaller states objected to this on the ground that their candidates might not win, and the issue was resolved, rather regrettably in my view from a European stance, by deciding that the General Court should nevertheless be doubled in size. As the dodo said in Alice in Wonderland, everyone has won and so all must have prizes.

[5] Resolution 2278(2019), section 2.4.2

19. A fourth but related difference between the two systems is that the Article 255 Committee cannot play any real scope in shaping the Court of Justice or ensuring that its membership is in any way balanced or contains expertise in the fields now coming before the Court. From time to time, I and I know others have wondered whether the Court might not gain internally or in the eyes of European domestic courts, if more national judges were proposed. But nothing can be done about that, if national selection bodies choose other candidates. The Council of Europe has been rather more proactive in this area. Not only has it indicated that all three candidates in any list must be appointable, or the whole list may be rejected, it has also said that it will only consider a single-sex list if that sex is under-represented in the ECtHR or there are truly exceptional circumstances – which since 2019 requires a two-thirds majority to establish[6]. It has also determined not to consider lists of candidates where:

    (i) the areas of competence of the candidates appear to be unduly restricted;
    (ii) not all of the candidates fulfil each of the conditions laid down by Article 21, paragraph 1, of the European Convention on Human Rights;
    (iii) one of the candidates does not appear (though the Panel can only assess this on the papers, or leave it to the Assembly Committee to judge, when it sees the candidates) to have an active knowledge of one of the official languages of the Council of Europe and a passive knowledge of the other;
    (iv) the national selection procedure did not satisfy the minimum requirements of fairness and transparency;
    (v) the Advisory Panel was not duly consulted.[7]

20. It is worth touching briefly on a difference between the two systems not so far mentioned. Appointment to the Strasbourg Court is for nine years non-renewable, so the Panel Consultatif has no role at all when a judge's mandate ends. Appointment to the Court of Justice in Luxembourg is for six years, starting

[6] Resolution 2278(2019), section 2.4.1.
[7] Resolution 2278, section 2.4.2, which continues: *In such cases, the Committee on the Election of Judges to the European Court of Human Rights shall decide on a proposal to reject a list of candidates by a majority of the votes cast. This proposal shall be endorsed by the Assembly in the Progress Report of the Bureau of the Assembly and the Standing Committee.*

conventionally at the beginning of September and renewable. So the Article 255 Committee has a role, in checking suitability for re-appointment – thought it has, as stated, taken the view that it can only assess candidates for reappointment on paper. Where the Article 255 Committee has no role is in relation to non-renewal by a Member State of the mandate of a judge or advocate general whose six0year tenure has come to an end. This can be seen as problematic, in terms of the potential pressure on a judge who is ready and willing to continue in office. Some countries renew almost automatically; others not. The problem is particularly problematic, when the retiring judge is initially appointed for a stop-gap term. This can happen, for example, where there is a need to fill a gap left by death or resignation. Full-term, six-year appointments are customarily made so as to expire with the next August. So a stop-gap appointment may be for a short term, ending with the next August, with the understanding that the new judge will then be re-appointed for a full six-year period. But a government may change during the short initial term, and may prefer some other candidate. When this actually occurred, we took the view that we were as a Committee bound to review the new candidate, but we wrote expressing to the governments of Europe our concern about what was occurring, and the new candidate, to their credit, withdrew. The government did not attempt to find another willing candidate, so the satisfactory result was that the original candidate remained in office.

21. In practice it is probably in their informal encouragement of particular criteria or qualifications that both the Panel Consultatif and the Article 255 Committee have had the most influence. The Article 255 Committee aimed from the start at as much transparency about its activities and approach as the necessarily secret opinions would allow. Both the Article 255 Committee and the Panel Consultatif now publish very informative activity reports. In addition to the numbers of candidates seen and opinions issued, the overall numerical outcome and time taken, the Article 255 Committee and the Panel have in their reports emphasised the importance of the role of an open, transparent and rigorous national selection procedure led by an independent and impartial panel, explaining that an effective national procedure may work in a candidate’s favour, even though a candidate cannot be faulted for an ineffective national procedure.

22. Reading the material relating to the Panel Consultatif it is evident that it, fortified by express Assembly Resolution, focuses closely on the nature and adequacy of national selection procedures. The lack of any interview process before the Panel Consultatif probably makes this focus inevitable. One may perhaps regret that an eminent Panel of lawyers does not enjoy the same ability to test the abilities and qualities of candidates by direct personal interview, but that this is left to a large Committee of the Assembly.

23. Standing back and looking at the fifteen years experience of both Panel and Article 255 Committee, the crucial question is whether they have earned their keep. I answer that unhesitatingly. I could have done so within a shortish time after first starting as a member of the Article 255 Committee. It was apparent that considerations of domestic advantage, personal connections, friendship and favours could all play a role in appointments, and that the Article 255 Committee was potentially an important bulwark supporting the rule of law administered by competent and independent judges. The statistics speak for themselves in relation to both the Committee and the Panel.

24. As to the Article 255 Committee, over the years to 2022, 27 adverse opinions were issued, 12.5% of the total number of applications reviewed, but, if one excludes the (in practice so far invariably favourable opinions on renewals), the percentage of adverse opinions climbs to some 28% (eight out of 29).

25. As to the Panel, a precise breakdown is difficult, because lists or candidates may have failed at any of three levels. But an analysis in the European Convention on Human Rights Law Review by Sir Paul Mahoney (from whom we shall hear later today) discloses that 15 out of 54 candidates were judged by the Panel to be unqualified in the three years from May 2019 to July 2022 that is 28%. An article in the European Journal of International Law dated 5 December 2024 by Anca Ailincai, Professor of Public Law at Grenoble, makes equally disturbing reading, though it demonstrates the Panel's work and worth. She writes:

> *Over the past decade, a total of 77 lists were presented by national authorities, 51 of which resulted in the election of new judges, while the*

election procedure was unsuccessful in the remaining 26 cases. In other words, the election procedure failed in approximately 34 % of cases, despite the fact that the States concerned had presumably received advice from the Advisory Panel. This may suggest that the Panel's advice was not followed. A cause for further concern is that a few States had their lists rejected more than once. 38 submitted lists (50 %) led to the election of a new judge at the first attempt. Of the 26 lists that did not result in the election of a new judge, 18 were formally rejected by the Assembly. In 7 cases, the national list was formally rejected only once (Hungary in 2016, Georgia in 2017, Ukraine in 2021, Denmark in 2022, Serbia in 2023, and Cyprus and Andorra in 2024). In 4 instances, the national lists were formally rejected twice (the Slovak Republic in 2013 and 2014, Azerbaijan in 2015 and 2016, Albania in 2016 and 2017, and Türkiye in 2017 and 2018). Poland is the only State to have presented lists that were rejected three times in a row, in 2021, 2022 and 2023. Of the 18 rejected lists, 3 were rejected on procedural grounds (Hungary and Albania in 2016, and Poland in 2021), and 15 were rejected on substantive grounds. In addition, there were 4 instances where candidates withdrew before the formal rejection of the list (Monaco in 2015, Türkiye in 2018, Iceland in 2022 and Austria in 2024) and 4 other cases where PACE's Committee postponed its decision for unknown reasons (Georgia in 2016, and Serbia, Monaco and Slovenia in 2024).

These figures make it clear that governments present an excessive number of inadequately qualified candidates (see also here, p. 14 and here, § 86), and that Poland had the most unsatisfactory results.

26. What one can say is that the position would without question be much worse without the Panel and the Committee. The Panel Consultatif has established itself as a very important and effective institution. Happy 15th birthday to the Panel Consultatif and to all those who apply for appointment with the right qualifications!

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