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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CLOSING SESSION

Conclusions

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1. Introduction

I am very honored that the organisers of the present seminar should have invited me as an "outsider", albeit a sympathetic one, with respect to the system for the selection and appointment of judges of the European Court of Human Rights to present conclusions at the present seminar. Not being an *aficionado* of this system, I am conscious of the risk of perceiving problems that have already been resolved, of proposing solutions which have already been rejected, or of ignoring old but invisible sensitivities. In any case, no form of criticism of the work of the Advisory Panel or PACE Committee is intended.

In one sense, "conclusions" is a rather grand term for my contribution, given that the debate on the functioning of the Advisory Panel system is anything but concluded. In another sense, however, the conclusions of the day's seminar are relatively straightforward and more or less unanimous: significant progress in ensuring the competence and independence of the judges of the European Court of Human Rights has been made since the Panel was established in 2010, but there is still room for improvement. Lord Mance's variation on the theme, that the situation would no doubt be much worse if the Panel had not been set up, equally captured the mood of the room.

I would also hesitate to assume the mantle of "General rapporteur" proposed by Sir Paul Mahoney. It would be impossible within a reasonable word extent adequately to summarise and/or comment on all of the presentations made at the seminar, and otiose to attempt to summarise and/or comment on just a selection of these, when the only good advice to the reader would be to peruse them all.

Instead, I will pick up on a handful of points which seem, from my bird's eye view, to merit particular attention.

2. On judicial selection for apex courts in general

In his opening remarks, Lord Mance underlined the fundamental importance of individual merit in the selection of judges of whatever ilk. To that could be added a second dimension, the requirement of diversity in the judiciary, with respect to gender, ethnicity, age, religious identification, education, social background, professional expertise, relevant personal experience, and so forth. This is of particular significance for the composition of courts of final instance, given gamut of their material jurisdiction and the potential impact of their decisions. For those international courts where each

Member State has the right to nominate a single judge, only national diversity is guaranteed. The PACE Committee and in turn the Assembly have the opportunity, which is denied the European Union's Article 255 Panel, to influence the composition of the Court as a whole.

In practice, there are two principal techniques for selecting judges of apex courts and tribunals, including those of the international variety. The first relies primarily or exclusively on procedure and is hence unabashedly political in character, and in some cases party political. The paradigm here is the Supreme Court of the United States, appointment to which is not dependent on fulfilling any predefined requirements, even that of a minimum of judicial experience. Elena Kagan, for example, was appointed Justice of the US Supreme Court without ever having sat as a judge at either State or Federal level.

The other approach relies on the judges fulfilling substantive criteria of integrity and competence. Here the paradigm was, until 1 December 2009, the Court of Justice and General Court of the European Union, whose judges and advocates general were chosen on the basis of their "independen[ce] beyond doubt" and specified qualifications or assumed ability. The sole procedural element, that the judges were (then as now) appointed by the Member States acting "by common accord," rather than by the individual nominating governments, appears to have been something of a formality; no instance of one government objecting to the candidate of another government has ever come to light.

While for the purposes of presentation, as in the present seminar, it may be appropriate to examine the procedure and the criteria for appointment separately, the example of the pre-2009 EU Court shows that in order to get a true picture, the two should be considered as an ensemble. In the then absence of any procedure for supervising the proper application of the Treaty criteria, judicial selection was effectively conducted at the national level, with no European Union input, and was in effect political in character, without even the element of democratic legitimacy provided in the US federal system by the participation of the Senate.

The selection and appointment system of the Council of Europe has long represented a uniquely developed attempt to reconcile the inevitable political input in judicial appointments and the necessary respect for requirements of personal integrity and professional competence. I say "inevitable": under separation of powers thinking, the judiciary is a branch of government, and it is hardly to be expected that national governments would not wish to be involved some way in appointments to a court of such importance and prestige as the European Court of Human Rights, whose primary function is to pass judgment of the action or inaction of those very governments or their predecessors, just as governments are directly involved in appointments to other international courts and tribunals.

One of the distinctive features of the Council of Europe system, as Petra Bayr has noted, is that the final decision on the appointment of the judge is taken by a parliamentary body. The Parliamentary Assembly of the Council of Europe necessarily includes representatives of opposition parties, which is particularly appropriate for a court which rules on rights of minorities and those who may otherwise oppose the public authorities, including some who find themselves on the wrong side of the law. By contrast, and notwithstanding its repeated requests over many decades for a say in appointments to the EU Court, the sole element of participation of the European

Parliament in the selection of CJEU judges and Advocates General is its right to nominate every four years one of the seven members of the Article 255 Panel.

3. On national selection procedures

Ms Bayr's announcement that the PACE Committee would be inviting the Committee of Ministers to revisit clause IV.1 of its 2012 Guidelines responds to a well-documented concern of the Advisory Panel (Sixth Activity Report, 5 November 2025, paragraph 51), regarding what exactly is meant by "balanced composition" of national selection bodies. As well as proposing that the Guideline stipulate that the majority of the members of such bodies must be from outside government – which should in principle already be guaranteed, in so far as *all* such members must be "free from undue influence" – the PACE Committee initiative would be a good opportunity to clarify what is intended by the requirement in the same Guideline that members come from "a variety of backgrounds". Like charity, diversity begins at home; if the composition of the national selection body is not sufficiently representative of the society in whose name it is acting, it is unlikely that its choice of candidates will allow the PACE Committee to ensure diversity in the membership of the Court.

A second concern of the Panel which the PACE Committee might consider taking up is the practice of restricting the possibility of applying to "representative bodies" rather than allowing candidates to put themselves forward (Sixth Activity Report, paragraph 49). Remarkably, Guideline III.4 appears to condone exactly such a system; it only requires that "safeguards should be put in place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward". By adding an extra layer between the would-be candidate and consideration by the selection body, such a nomination-based system could have a significant "chilling effect" on potential candidates, so that they never in fact become "applicants".

A third concern of the Panel is the paucity of information it receives about the national procedures in certain cases, regarding both what the procedure is and how it was applied. notwithstanding the stricture of Guideline III.1 that "[d]etails of the procedure must be made public". This is as surprising as it is regrettable: if you expect advice from an expert, at the very least you should provide the expert with the information required to do the job. Moreover, it would surely be helpful for all concerned if the governments were to provide the Advisory Panel with details of the national selection procedure *before* the call for expressions of interest is launched and allow the Panel to provide advice at this early stage, prevention being better than cure.

4. Functioning of the Advisory Panel

A more controversial matter was that of the working methods of the Panel itself, and in particular the fact that it must base its assessment essentially on files of the three candidates remitted to it by the nominating government, without hearing the candidates in person at any point. This raises two related questions: the scope and quality of the information available to the Panel, and the possible repercussions of the present procedure on the authority of the Panel's opinions.

(a) Scope and quality of the Panel's information: hearings, no hearings?

Concerning the written files, the Advisory Panel stands at a marked disadvantage compared to the Article 255 Panel. This latter has at its disposal not only the

candidate's cover letter – which is considered to be a very significant part of the file, rather a mere polite formality – and *curriculum vitae* (which must be presented in a form laid down by the Panel itself), but also the text of one to three publications of the candidate and "a presentation of one to three complex legal cases which the candidate has handled in a professional capacity". What is particularly interesting is that these procedural requirements are entirely the creature of the Article 255 Panel itself, with no input from any of the political – or, if you a legal realist, "more political" – authorities of the European Union, though of course the Panel itself has a solid legal basis in the EU Treaties.

If the Committee of Ministers were to revisit its Guidelines, it might be helpful that it lay down more detailed provisions regarding the basic documents which must be provided in respect of the candidates, such as publications and/or case notes, as part of the evaluation procedure at the national level. Particularly given that the Advisory Panel has only a written file to go on, supplying a more complete set of written documents, including something like the case notes required by the Article 255 Panel, would make its task somewhat easier and perhaps reduce the number of "borderline cases".

President Grabenwarter suggested that the candidates' biographies should be the primary basis for their assessment, as this would help consolidate confidence in the case law of the ECtHR, and that hearings were "only a snapshot in time" whose primary added value in this context was to facilitate the evaluation of candidates' language skills. Judge Mathieu, on the other hand, noted that "for certain writers, the impossibility to interview candidates was the principal weakness of the Panel".

In practice, it is generally considered that hearings – or in the ordinary employment context, interviews - complement and complete the assessment of a candidate based on their written file. The hearing can thus serve to correct an overly positive, or negative, impression of a candidate; in cases where several candidates are competing for a post, such as before the PACE Committee the hearing can assist greatly in ranking these in order.

The utility of hearings is, moreover, explicitly recognised in the Council of Europe system. According to the Steering Committee for Human Rights, between January 2017 and November 2023 the PACE Committee proposed the rejection of six lists based on the interviews of the candidates (2023 Report, paragraph 34). In 2023, that Committee decided that it would no longer even consider national lists of candidates where no interviews had been carried out at the national level. Lord Mance has recounted how the Article 255 Panel gleaned "direct evidence" of a candidate's integrity during the course of the interview, as he put it, "under cross-examination".

Lord Mance's remark underlines the difficulty the Advisory Panel has, which it has itself underlined in different activity reports, in evaluating a candidate's "high moral authority". Like the impartiality of a judge, compliance with this requirement is presumed in the absence of evidence to the contrary. Obviously neither the candidate nor the nominating government would ever submit spontaneously such evidence in writing.

It appears that in this regard the Advisory Panel may examines "unsolicited material from various sources (for example, non-governmental organisations and individuals, including unsuccessful applicants for being a candidate)". While the Panel may put questions to the nominating government, there is no guarantee that the government will be able to provide it with the necessary information, particularly if this pertains to

the candidate's private life; in any case, it is unlikely the government would be able to respond as fully or accurately as the candidate would. The same is true of "notorious information in the public domain", which is not always notoriously reliable, and of allegations against the candidate submitted by a disappointed applicant.

While in practice the Advisory Panel may be well able to distinguish between scuttlebutt and relevant supplementary information meriting consideration, a candidate rejected on the basis of matter of which she has not been notified, still less been allowed to contest, might well have grounds to feel they have not been fairly treated. In the context of international civil service law, such a candidate could evoke principle of *audi alteram partem*, though not, apparently, here.

The Panel is assessing the capacities of the candidates for a post which carries enormous responsibility and which the appointee would occupy for a significant period of time. Yet at present the Panel is to some extent flying blind, relying for supplementary information on the nominating government, a perhaps less than disinterested third party. If hearings are essential for the national selection panel, then it is difficult to understand why they are not equally essential for the Advisory Panel, given that their respective role in each case is the same, to assess the individual suitability of candidate judges for appointment to the European Court of Human Rights.

(b) *The authority of Panel opinions*

Different speakers adverted to the fact that "once in a while", the Panel's advice was not followed either by the nominating government or by the PACE Committee. With respect to the first, which was described as "not necessarily worrisome", this was explained in large part by the fact that the Panel did not conduct hearings. Thus, a government might quite plausibly reason that a candidate who has been selected on the basis of a hearing should not be rejected without any such procedure.

For the PACE Committee, Ms. Bayr explained that "unavoidable … discrepancies" between the Panel's assessment and that of the Committee arose because these are "different bodies with distinct compositions, backgrounds, and responsibilities". To the outsider, this is distinctly worrisome. There is a significant risk that such occurrences, however rare, undermine the Panel's authority in the eyes of the national governments: "if even its own committee doesn't follow the Panel, why should we?"

In the system of the European Court of Human Rights, it could be argued that the task of evaluating individual suitability for appointment to the Court falls within the specific competence of the "Advisory Panel of Experts", while the PACE Committee has the different, but equally, if not more important, role of selecting, from amongst three persons of sufficient merit, the candidate it recommends for appointment as a judge. In so doing, the Committee can bring its political sensibilities to bear, including by promoting diversity in the composition of the Court.

5. <u>The functioning of the PACE Committee</u>

In his very helpful report, Mr Cilevics lists some twelve qualities on which a candidate judge should be evaluated: these range from general knowledge and knowledge of European Convention law, through soundness of judgement to "courtesy and humanity, commitment to public service and conscientiousness and diligence". He also reports that PACE Committee hearings with the three candidates are scheduled

for 30 minutes, with five minutes for the candidate to present themselves, and other five or so minutes for standard questions from the President. This leaves the remaining members of the Committee approximately one minute each to ask a question, and for the candidate to respond, on the twelve listed personal qualities, and for the Committee to test the candidate's proficiency in either French or English or both, as need be.

By contrast, the Article 255 Panel allows a full hour per hearing for first-time candidate appointees at the European Union Courts. The candidate is first allowed ten minutes to make a presentation of their application and to speak to one of the complex legal cases on which they had submitted a case note. This last element, and the fact that its assessment is in no way comparative as is that of the Advisory Panel, leaves the members of the Panel a luxury of time for spontaneous questions which seek to probe all aspects of the individual candidate's suitability for office. Even as regards assessing linguistic capabilities, the Article 255 Panel need only test the candidate's ability to work in French which, for the quite large proportion of nominees who have previously worked at the CJEU, is a given.

The comparison with the Article 255 Panel is not a criticism of the working of the Committee for the Election of Judges. I am aware how precious parliamentary time is, having worked at the European Parliament for many years. As Mr Cilevics pointed out in 2018, a one-hour hour interview per list would take up half a meeting day at a time. If there were an average of, say, five lists per year to deal with that would leave the Committee with very little time to do anything else, such as supervising the design and functioning of the election procedure for judges.

Taking one consideration with another, it would seem, at least to this outsider, that a more rational division of labour would be to vest the duty of hearing candidates in the Advisory Panel. On the basis of an even more reliable opinion of the Panel, the PACE Committee could then select, following its own political criteria, which of the candidates it recommends should be appointed.

6. Criteria for appointment to the European Court of Human Rights

Sir Paul Mahoney has suggested that the three criteria for appointment to the European Court of Human Rights – "high moral character", and qualification for "high judicial office" or being a "jurisconsult of recognised competence" – are "very general and [based on] somewhat antiquated concepts" and pose "some problems of comprehensibility for the modern reader".

That may be so as regards the general public – and not just in modern times - but specialists in international law appear to be happy enough with these criteria, with the sole exception of the term "jurisconsult" which is indeed redolent of a bygone age. Article 36(3)(a) of the 1998 Statute of Rome setting up the International Criminal Court, for example, requires that its judges be of high moral character and have the "qualifications for appointment to the highest judicial offices" in their respective States, as well as the more specific requirements of competence and experience in the field of criminal law or "the relevant areas of international law" detailed in Article 36(3)(b).

Nor are these terms necessarily so vague as to not admit of their application in practice. In so far as reference is made to the governmental structures of the High Contracting Parties, it is possible to determine for most of these a hard core of positions which constitute "high judicial office", albeit that there may be a penumbra of

public positions whose categorisation may not be clear. There are also, of course, very significant differences between the Parties in this regard.

Lord Mance downplayed the difference between “highest” and “high” judicial office in this context. It is true that in the case of the European Union judiciary these gradations do not appear to have played a very significant role in practice; several judges who originally became members of the CJEU on the basis of their ability to be appointed to “judicial office” *tout court* have subsequently become judges of the General Court or the Court of Justice. On 30 November 2009, the qualification for appointment to the General Court was upgraded from “judicial office” to “high judicial office” overnight, with no-one blinking an eye.

That said, the authors of international treaties are generally known to choose their words carefully, and it may be that, perhaps because of the relatively un(der)developed state of human rights law at the time, the drafters of the European Convention preferred to loosen the strictures of Article 2 of the Statute of the International Court of Justice from “highest” to “high”. If this is so, then those who have the qualifications for judicial office below the highest level, for example a High Court judge who would be qualified for elevation to the Court of Appeal, would be entitled to be considered for appointment to the European Court of Human Rights, even though she would be classified as a judge of first instance.

The point is not banal, given that the Panel considers that judicial experience in a “lower, non-appellate” court would not qualify a candidate for appointment (leaving aside the “jurisconsult” option). This view is bolstered by the argument that judgments of the European Court of Human Rights “may in effect overrule” judgments of the national superior courts.

Even with the prudent proviso “in effect”, such analysis appears to be based on a hierarchical understanding of the role of the European Court of Human Rights. A different view would be to consider the European Court of Human Rights as a specialist court for the interpretation and application of the European Convention, whose rulings the Contracting Parties must respect and apply, but which do not have immediate binding effect in the legal order of the Contracting Parties other than by virtue of that Party’s national law. The nuance is that judgments of the national superior courts are authentic as regards matters of national law, and the European Court of Human Rights does not therefore “overrule” national courts, in the way judgments of the United States Supreme Court, for example, overrule judgments of State courts. Under this interpretation, there would be no suggestion that the national superior court in question erred as regards national law; it is the national law which is itself defective with regard to that of the European Convention.

Sir Paul’s reluctance to see “mid-level career academics, judges from lower courts, and practicing professionals with no particular experience of the kind of issues that come before the Court” being appointed as judges is naturally perfectly justifiable. In my view, however, it would be their lack of relevant experience which would preclude the appointment of such persons to the Court, regardless of the particular position they occupy in the academic or judicial hierarchy, and providing they fully satisfy the requirements of Article 21(1) of the European Convention.

Much has been made, quite correctly, of the necessity that the judges of the European Court of Human Rights have sufficient authority that the national superior courts will be willing to accept and apply its rulings. To that end, it might be appropriate to borrow

a different leaf from the book of the International Court of Justice. Nominations to that august body are made by the national groups of the Permanent Court of Arbitration; Article 6 of the ICJ Statute recommends that "each national group … consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law." National selection committees could proceed to a similar consultation before concluding their deliberations on the list of candidates for the European Court of Human Rights.

7. Future Prospects?

While acknowledging that the seminar was "the birthday party for a teenager", President Grabenwarter did not shirk from presenting the most radical proposal of the day: that the Council of Europe should adopt the one-candidate system of the European Union, with a concomitant strengthening of the role of the Advisory Panel, whose duties and powers would be be aligned with that of the Article 255 Panel, while retaining the possibility for the PACE Committee to reject a candidate passed by the Panel.

In this regard, the words "baby" and "bathwater" come to mind. As Ms Bayr noted, the election of the Court's judges is "one of the Assembly's most important prerogatives" and "provides a measure of democratic legitimacy to the Court". The primary specificity of the Council of Europe system is to allow a body comprising democratically elected representatives to choose, from a list of three meritorious candidates, the judge who will best meet the needs of the Court at the given time. This precious feature of the system would be lost if the Council of Europe were to align its appointment arrangements with those of the European Union.

In a 2023 article, called "Europe is looking for a Super Judge", Justice Julia Laffranque of the Supreme Court of Estonia, former judge of the European Court of Human Rights and current member of the Article 255 Panel, proposed the converse initiative, that the European Union should adopt the Council of Europe system. In my view, this would be a more promising avenue to be explored, and a better means of harmonising the two systems of appointing European judges. But that's a story for another day.