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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# INTERPRETATION AND APPLICATION OF ARTICLE 21(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: CRITERIA IN PRACTICE

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**Response to the report presented by Sir Paul Mahoney.**

## 1. Introduction

To begin with, I should confess that I will engage in a degree of self-plagiarism by drawing on my own editorial note, which accompanied the insightful and thought-provoking essays by Judges Mahoney and Keller, and by Mr Hans-Jörg Behrens, published in Issue 4 of the 2023 *European Convention on Human Rights Law Review*.[1] These pieces, all available in open access, address various aspects of the election of judges and offer a number of valuable suggestions in that regard.

So, I will cover three points that were already touched by Paul Mahoney and Laurence Burgorgue-Larsen. First, I will talk about the importance of the people on the bench for the legitimacy of the European Court of Human Rights. Second, I will discuss the inherent limitations of the Panel's work. These limitations need to be considered seriously as they can affect the legitimacy of the Panel's work as well as the legitimacy of the whole election/selection process. Finally, I will cover the need for a diverse professional representation on the bench.

One further caveat that I must make is that some of the points that I will make would be relevant to the whole process, not just the Panel. Sometimes it is difficult to clearly see which part of the system is working or not because of the veil of secrecy that is covering significant elements of it. In 2012 the Guardian journalist called the process of selection of judges in Strasbourg 'the byzantine appointment procedure'.[2] I am not sure what exactly he meant but I can feel the negative connotation. I think that this is a massive exaggeration and the process of election of judges really improved over the last 20 years that I observe this process and especially in the last 15 years. However, there is space for more transparency.

I have advanced the argument for greater transparency in the work of the PACE Committee on numerous occasions, including the proposal that interviews with

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[1] Issue 4 of the 2023 *European Convention on Human Rights Law Review.*
[2] https://www.theguardian.com/law/2012/may/22/mps-secretly-vet-judges-european-court-of-human-rights.

candidates should be publicly broadcast. Each time I make this suggestion, I am presented with a range of objections, none of which I find particularly convincing—hence my continued insistence on the point.

The arguments raised against broadcasting appear to be several. One is that there is little public interest in the process, and therefore enhanced transparency is unnecessary. Another, conversely, is that broadcasting interviews may embarrass senior lawyers, thereby discouraging strong candidates from applying. A further concern is that the recordings could be used for political purposes. In my view, these objections are rather weak, as similar claims could be made in respect of transparency within any administrative procedure.

Judges of the highest regional human rights court should not be embarrassed to speak in public or to answer questions concerning their professional competence. Judges are public servants, and it seems only appropriate that the selection process be conducted transparently. As Sir Paul Mahoney noted, a judge must command authority and be held in high esteem by their domestic peers. I would argue that this is difficult to achieve if a prospective judge is unable to speak effectively in public or to demonstrate their expertise openly.

**2. Judges as the ambassadors of the Convention**

This brings me neatly to my first point. Judges are central to the legitimacy of the Court. Their importance lies not only in their ability to work collectively and produce well-reasoned and persuasive judgments, but also in their role as ambassadors for the Court—domestically, and, in the case of the President and the Court's senior judges, throughout Europe.

The academic community also has an important role to play. Universities can support judges in disseminating the values of the Convention through education and engagement. At Liverpool Law School, for example, we have developed an International Judge-in-Residence programme, and several judges of the Court have generously accepted our invitations to participate. Their visits have provided invaluable opportunities for our students to learn directly from those who interpret and apply the Convention at the highest level.

Professor Mikael Madsen argued that the success of the Court in the early days rested in Judicial diplomacy when part time judges were able to educate local legal elites and governments as to how to read and implement the judgments of this court.[3] This would be impossible if judges did not engage with their national authorities of course without undermining their independence

[3] M.R. Madsen, "The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court", 2 European Convention on Human Rights Law Review (2021); M.R. Madsen, "Legal Diplomacy – Law, Politics and the Genesis of Postwar European Human Rights", in S.L. Hoffmann (ed.), Human Rights in the Twentieth Century: A Critical History (Cambridge University Press, 2011).

I also argued that the judges of the Court help to create an informal feedback loop between the Court and the stakeholders by participating in various events for national courts, layers, politicians, NGOs, academics etc.[4] Here one can recall a theory of voice and exit[5] that states that parties are less likely to withdraw from an institution if they have ample opportunity to voice their concerns and respected judges who are open to dialogue can create and maintain yet another avenue for voicing concerns. This is all relevant to the election of judges, as a well-respected and independent judge is better placed to establish and maintain an effective feedback loop between the Court and its various constituencies.

## 3 Inherent limitations of the Panel

The underlying assumption is that sound outcomes require sound processes, and the Panel constitutes an important element of the judicial election system. However, it was established with certain inherent limitations, foremost among them its purely advisory role. It is therefore essential that the Panel's recommendations are treated with due seriousness. I am not certain whether a representative of the Panel currently participates in the interviews conducted by the Committee on the Election of Judges, but such participation would, in my view, be crucial—particularly where the list of candidates has already raised concerns at the Panel stage.

The fact that there are no interviews is a major limitation for the panel as some criteria enshrined in Article 21 can hardly be checked purely on the basis of written documents. And I am not only speaking about linguistic skills, but also other relevant competencies can be checked during the interviews. Moreover, the panel members are former judges and can have deeper appreciation of some of the aspects of the answers than the politicians members of the Committee even if they have legal background.

Finally, the selection process in general but also the work of the panel is also tested from the perspective of equality and consistency in application of criteria. The major inherent limitation of the panel from this perspective is the fact that the criteria of evaluation of the CVs of judges are very vague and the measuring scale is slippery and illusive as an eel.[6] There are other inherent limitations that I have no time to cover. The legal profession operates under markedly different regimes across Council of Europe member states. Moreover, professional achievements are not always commensurable: what may constitute the pinnacle of a legal career in one jurisdiction—such as holding a professorship at a prestigious university—may represent only a mid-career milestone in another. This disparity renders cross-national comparison challenging and exposes the process to allegations of double standards.

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[4] K. Dzehtsiarou, Keep Me in the Loop: Feedback Exchange between the European Court of Human Rights and States. *The Law & Practice of International Courts and Tribunals*, (2023), *22*(3), 591-622.
[5] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States* (1970).
[6] Inspired by Lord Lester's comments about the Margin of Appreciation. See, A. Lester, 'Universality versus Subsidiarity: A Reply' (1998) 1 EHRLR 73, 75.

One possible response is the development of even clearer and more detailed assessment criteria. Yet greater precision alone cannot adequately capture atypical or unconventional career trajectories, which may be equally valuable. Striking an appropriate balance between clarity and flexibility is therefore both difficult and essential for preserving the Panel's legitimacy.

**4. Diversity on the bench**

This brings me to the final point that I will try to make. Over last few decades I have a feeling that the general consensus is that the Court needs professional judges and lawyers on the bench. This resulted in appointing more and more of such judges. The number of academics still remains significant but the tendency is that the number of practicing judges increases. I argued before and I want to reiterate that diversity of experiences on the bench is a virtue.[7] Moreover, different countries and regions appear to prioritise distinct profiles when putting forward candidates. This is not, I would suggest, a particularly healthy state of affairs. Put rather crudely, Northern European states tend to favour candidates with judicial backgrounds, whereas Southern and Eastern European states remain more open to nominating academics. Such patterns may lead to undesirable outcomes if the same type of professional background is repeatedly preferred. Over time, this risks creating a chilling effect for other potential candidates who may feel discouraged from applying, thereby narrowing the pool of expertise available to the Court. I think that it is important to have all sides of legal profession to be represented.

To conclude – it is great that Panel was created, and I think that it made the process of election of judges more robust and fairer. However, there is still scope for further improvements.

[7] See, Dzehtsiarou, K. (2023). Reforming the Election Process of Judges of the European Court of Human Rights. European Convention on Human Rights Law Review, 4(3), 231-239; K Dzehtsiarou and A Schwartz, 'Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why It Matters' (2020) 21 *German Law Journal* 621.