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
27 November 2025, Strasbourg

NATIONAL PROCEDURES OF SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS: CHALLENGES AND GOOD PRACTICES

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1. Welcome

I am happy to see that there is a lot of attention for this thematic session. Many of you have been involved in the process of selecting judges, either as candidates (I welcome in particular all the judges and former judges of the Court, who started as candidates), or as officials dealing at one point with applications or with a list of candidates.

We have also a very good panel for this session. I will introduce the speakers one after the other. At this point, I would already like to say that Prof. Irena Pelikanova, member of the Advisory Panel, was unable to attend, at the last minute. We regret that she cannot be with us. She will be replaced by another member of the Panel, Justice Saale Laos.

2. In order to introduce the topic of this session to you, I would like to briefly recall two important rule-of-law judgments of the Grand Chamber of the Court. Both judgments deal with the independence of *national* courts and *national* judges, and with the relevance of the process of appointing national judges for their independence.

The first case is ECtHR [GC], 1 December 2020, **Gudmundur Andri Ástrádsson v. Iceland**. This case was about the requirement that a tribunal must be "established by law". The Court held:

- it is inherent in the very notion of a "**tribunal**" that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law (§ 220);
    - [the] requirement [that a tribunal should be "established **by law**"] reflects the principle of the rule of law and seeks to protect the judiciary against unlawful external influence, from the executive in particular (…), although it cannot

be excluded that such unlawful interference may also emanate from the legislature or from within the judiciary itself" (§ 226);

- "the Court considers that the process of appointing judges necessarily constitutes an inherent element of the concept of "**establishment**" of a court or tribunal "by law"" (§ 227);
    - "the mere fact that the executive, in particular, has decisive influence on appointments – as is the case in many States Parties, […] – may not as such be considered to detract from the characterisation of a court or tribunal as one established "by law". The concern [inherent in the requirement that the tribunal must be established "by law"] relates solely to ensuring that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive (§ 230);
    - "in order to establish whether a court can be considered to be "**independent**" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members" (§ 232);
- "[**Independence**] characterises [among other things] a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers […]" (§ 234).

It's all here: judges need to be independent from the executive and the legislature, and in order to guarantee that independence, the selection must be based on merit. Undue influence or unfettered discretion of the other State powers in the selection process is incompatible with the requirement of independence.

The importance of the selection process has further been highlighted in ECtHR [GC], 15 March 2022, **Grzęda v. Poland**. That is a case about the dismissal of a member of a national judicial council. In the country concerned, that council had "exclusive competence to propose candidates for appointment at every level of the judiciary and to every type of court" (§ 306).

The Court made clear that "the Convention does *not contain any explicit requirement* [to put in place a judicial council as a body responsible for the selection of judges]". However, "*where* a judicial council is established, the Court considers that the State's authorities should be under an *obligation to ensure its independence from the executive and legislative powers* in order to, *inter alia*, safeguard the *integrity* of the judicial appointment process" (§ 307). States "cannot […] instrumentalise [a national judicial council] so as to undermine that independence" (ibid.).

We will be able to hear how procedures for the selection of national judges are organized in practice, across various member States of the Council of Europe, and what challenges are encountered. The findings can help to improve the process of selecting judges for the European Court.

3. Indeed, many if not all of the principles developed in the case law of the Court can be transposed, *mutatis mutandis*, to the *process of selection of judges for the Court*. What we can learn from the case law of the Court is, in substance:

> - that the *quality of the selection process*, both at the national level and in Strasbourg, is *highly relevant* for the quality and the independence of the judges and the Court. Who would disagree with that?;
> - and specifically with respect to the *national* selection procedure – for which under the Committee of Ministers' Guidelines there must be a "body responsible for recommending candidates" to the final decision-maker (point IV) - that the procedure must be such that the selection is made *on the basis of merits* and that there is *no "undue" political influence* (ibid.).

4. I just referred to the **Committee of Ministers' "Guidelines** on the selection of candidates for the post of judge at the European Court of Human Rights" (adopted in 2012, and since then amended a few times). They cover, in some detail:

- the procedure for eliciting applications (call for applications)
- the national procedure for drawing up the recommended list of candidates
- the finalisation of the list of candidates at the national level

The **Parliamentary Assembly**, for its part, has stressed in resolution 2248 (2018) on the procedure for the election of judges to the European Court of Human Rights that "a list of candidates shall be rejected" when, among other deficiencies, "the national selection procedure did not fulfil minimum requirements of fairness and transparency" (§ 8.2.2).

I am sure that our panelists will discuss some or all of these requirements and guidelines.

5. Requirements and guidelines are one thing; **practice** is another thing.

The **Advisory Panel** has identified in its last report several aspects of the national selection procedure that it looks into (§ 39). Its conclusion is as follows: "While many States have made commendable efforts to ensure fairness, transparency and compliance with the Guidelines of the Committee of Ministers, the Panel has also identified a number of challenges, shortcomings and practices that fall short of these standards" (§ 40). I am sure that the **commission of the Parliamentary Assembly** can come to a similar conclusion.

What are the good practices, and what are the challenges? Are the occasional differences in the assessments by the Panel and the Assembly an issue? Is there a need for

improvement of the interaction between the governments, the Panel and the Parliamentary Assembly? These are the questions we will deal with.