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STEERING COMMITTEE FOR HUMAN RIGHTS
COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME
(DH-SYSC)

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DRAFTING GROUP ON ISSUES RELATING TO JUDGES OF THE EUROPEAN COURT OF HUMAN RIGHTS
GROUPE DE RÉDACTION SUR LES QUESTIONS RELATIVES AUX JUGES DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME
(DH-SYSC-JC)

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Summary of the exchange of views on issues of selection and election of candidates (25 January 2023)

Résumé de l'échange de vues sur les questions de sélection et d'élection de candidats (25 janvier 2023)

prepared by the Secrétariat */ préparé par le Secrétariat*

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1. Introduction

DH-SYSC-JC agreed at its 1st meeting (28-30 September 2022) to hold an exchange of views on issues of selection and election of candidates with relevant stakeholders. It agreed to invite the Chairs of the Advisory Panel and the Parliamentary Assembly's Committee on the Election of Judges to an exchange of views at its 2nd meeting. It also agreed to invite two external experts from the scholarly community specialising on issues related to the Group's mandate. These scholars were selected on the basis of suggestions made by members of the Group to the Secretariat before 17 October 2022.

At its 2nd meeting (25-27 January 2023) DH-SYSC-JC held the exchange of views with:

- Mr Titus CORLĂŢEAN, Chair of the Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights;

- Sir Paul MAHONEY, Chair of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights;

- Prof. Dr. Helen KELLER, Chair for Public Law and European and Public International Law, Institute for International Law and Comparative Constitutional Law, University of Zurich;

- Prof. Kanstantsin DZEHTSIAROU, Professor in Human Rights Law and Associate Dean for Research of the School of Law and Social Justice, University of Liverpool.

2. Summary of discussions

Key points made by Mr Titus CORLĂŢEAN

- Several changes to the procedural rules were introduced by the Parliamentary Assembly's Resolution 2278 (2019). The Committee on Election of Judges has become gradually stricter in applying these rules, for example, as regards gender equality.

- The Committee pays increasingly attention to the Guidelines of the Committee of Ministers 2012.

- Rejections of lists on substantive grounds (i.e. not all candidates fulfilling the minimum requirements) are not uncommon, 5 lists rejected of 27 lists since January 2017.

- Protecting the reputation of candidates: a new practice allows candidates to withdraw before the Assembly formally rejects the list. The votes in the committee are published not in detail, but in a standardised manner.

- Conduct of interviews: very structured, each interview lasts 30 minutes. The assessment of the candidates is not based only on their performance during the half-hour interview, but also, and to a large extent, by their CVs.

- Delays in the election of judges are caused by governments who do not present lists within the deadline set by the Assembly. Possible causes for delays in presenting a list in good

time: internal difficulties in setting up and carrying out an appropriate national selection procedure; necessary dialogue with the Panel.

- On the national selection procedures, there has been a steady improvement in most member States since the Committee of Ministers' Guidelines in 2012.

- Lack of any consequences when governments simply do not transmit a list at all or keep transmitting unacceptable lists. Worth reflecting on a mechanism that puts some pressure on governments to submit acceptable lists of candidates in due time so that the judges' term of office under the Convention is not unduly stretched out.

- Need for all stakeholders to work together effectively on the basis of mutual trust and good faith, in order to achieve our common goal, namely, to ensure that the most qualified, independent and impartial judges are elected to sit on the European Court of Human Rights.

Key points made by Sir Paul MAHONEY

- The Panel has regard to the Committee of Ministers' Guidelines in interpreting and applying the minimum qualifying professional and personal conditions stated in Article 21§1 of the Convention.

- A practice of including observations on the national selection procedure in appropriate instances has been operated since the spring of 2019. The assessment is based on the criteria of fairness and transparency set out in the Parliamentary Assembly's Resolution of 2018.

- The exchange of views between Panel and Ministers' Deputies (November 2022) emphasised the proportion of negative opinions from the Panel and the differences between the Panel and the Parliamentary Assembly Committee as regards assessment of the candidates.

- The Panel finds it disappointing that the Governments are presenting so many apparently under-qualified candidates lacking the depth and breadth of professional experience required.

- As regards differences in assessment between the Panel and Assembly Committee, these are inevitable since the Assembly Committee can interview the candidates.

- The Panel seeks to be consistent in applying the Convention's minimum qualifying conditions from one list to another and to ensure equal treatment of all candidates, regardless of their country of origin.

- One suggestion for improving the selection process would be to improve the composition of the national selection body by making it visibly independent.

- The composition of the national selection body should be pluralistic, representing a variety of backgrounds and extending beyond government representatives or appointees so as to include genuinely independent members.

- The Panel's experience suggests that the process of selecting and electing judges could be improved if the practice of the States in implementing the Guidelines were improved.

Discussion

- A question was raised in relation to nomination of candidates by member States. According to Article 22 of the Convention member States nominate three candidates. The European Court of Human Rights is just one of the international tribunals or jurisdictions to which member States nominate judges, for example in the context of the EU. Does this focus on an independent body mean that governments should have a lesser role and just rubber stamp nominations made by other bodies?

  Responding to this, the experts agreed that the sovereign right of a government to nominate its candidates for the Court is undeniable. The Parliamentary Assembly looks strictly at objective criteria, for example the pluralistic composition of the national selection body. Requirements are already present in the Committee of Ministers' Guidelines. The practice is different in different countries; many governments have independent bodies.

- Another question focused on the publicity of the procedure before the Panel. It was noted in the answer that the procedure before the panel is confidential. Attention is drawn to some aspects, and comments and anonymised data are regrouped for compilation in the activity report. One of the queries is whether the Panel could produce an anonymised databank; the Panel is looking at this question for the moment.

Key points made by Prof. Dr. Helen KELLER

- In order to increase the independence and impartiality of judges at the beginning of and during the mandate there is a need to increase their knowledge on potential dangers to their impartiality and to strengthen support for those judges who are on the receiving end of undue influence from governments.

- After their mandate judges may experience difficulties when going back to country of origin although no specific gender-based difficulties.

- Difficulties are greatest where we have a potential conflict between the Court's jurisprudence and the human rights situation in a country.

- Difficulties to re-enter a professional environment after a nine-year break. This tendency is even likely to increase if the mandate is extended to 12 years. It is less complex for judges with excellent professional qualifications but more difficult for judges who are less qualified (e.g. in terms of language).

- It is important to understand that whoever leaves his or her home country is not treated more favourably after nine years than someone who stayed at home.

- Not in favor of a system in which former judges would automatically be given a position in a national supreme court.

- To ensure that the best candidates make it to the ECtHR as judges, the election procedure would have to be improved in two ways: (1) the selection of candidates should be more transparent at the national level. Excellent candidates cannot be excluded without a justification; (2) there should be rules on lobbing in the Parliamentary Assembly.

Key points made by Prof. Kanstantsin DZEHTSIAROU

- There are three ideal types of judges, judge technician, judge philosopher and judge diplomat, which are generally associated with their professional background: academic, judicial or other legal practitioners. However, no individual judge will represent one of these "ideal" types, but always combine some features of them.

- Selection should maintain the proportion of all relevant professional backgrounds so that different types of competencies and skills can be reflected. The states should be encouraged to submit lists with people of varying professional backgrounds.

- Domestic selection process is where the key problems and challenges can happen: the *ad hoc* approach to selection, the absence of criteria for the members of national selection committee, and the significant variation in how determinative the decision of the selection panel is.

- To support national selection processes, the Council of Europe can encourage adoption of the best practice procedures based on decades of experience. It can be done through adopting a model law on the selection of judges. This could help states in a very practical way to create a stable and fair procedure.

- The Council of Europe could offer consultative and advisory services to the Contracting Parties regarding the process of selecting judge-candidates.

- Interviews should be broadcasted live or made public with some delay: increase the transparency of the process and would deter candidates who are clearly not up to the job from applying.

Discussion

- On the question what could be proposed regarding the issue of social media exposition of judges it was noted that judges should be cautious that they represent a function at the Court when being active on social media.

- The issue whether the duration of judges' mandate would be considered an attracting factor for a candidate or on the contrary discouraging was then discussed. It was noted that this depends on the specific situation of the candidate, if the candidate is young and has a good position in his/her country, then twelve-years mandate is not very attractive. If the candidate is in his/her 60s, it is very attractive.

- Situation in which governments calling sitting judges to influence their decisions require reflection by the Court. The judges concerned are very alone, they are pressured through family members at home. Some are more independent than others.

- Some interventions presented the issue of judges' potential conflicts of interest (links of judges with entities intervening before the Court, influence from entities which with judges had links before joining the Court). In particular, the question was raised whether an in-depth assessment of this issue exists.

  It was noted that it is difficult to a priori avoid situations of conflicts of interest (difficult to have someone without any conflict of interests). The Court should just not appoint a judge in a potential situation of conflict of interest as judge rapporteur.

- One intervention noted that family-life considerations may affect women judges in negative ways. Sometimes women have less experience because of having had to interrupt their full-time careers to bring up children, which in turn affects their position as candidates for the post of the judge.

- Discussions on transparency and public scrutiny in selection procedures noted the idea that these goals are achieved through publishing the names of all candidates. Broadcasting their interviews was not viewed as a viable idea, the risk being that interviews may be directed at an audience rather than at the Committee, thus becoming non-professional.

- On delays of member States to transmit list of candidates, it was noted that it is a problem and it happened often. The list is requested one year before. When the list is not sent, there are a series of problems, notably it undermines the authority of the Court and Council of Europe as a whole to not fulfil its duties. It would be advisable to come up with a mechanism to present list of States in due time.

3. Speeches

Titus Corlatean (Romania/SOC), Chairperson of the Committee on the election of judges to the European Court of Human Rights

Good morning colleagues,

I have had the honour to chair the Committee on election of judges to the European Court of Human Rights since January 2022 and I was a Member of this Committee for many years before that. I will be happy to share my experience with you this morning concerning the election procedure at the Assembly for the important post of judge at the European Court of Human Rights.

Let me start by saluting and thanking Sir Paul Mahoney for his excellent cooperation. In particular, the joint meeting between the Panel and our Committee in June 2022 permitted us to agree on and further clarify a number of issues regarding the interpretation of the eligibility criteria under Article 21 of the Convention.

On the side of the Assembly, several clarifications and improvements regarding the procedure were made in Assembly Resolution 2278 (2019), in particular the clarification and confirmation of existing practices, namely that

-Members of the committee from the country whose list is under consideration do not have the right to vote, either on the possible rejection of their country's list or on the expression of preferences among candidates;

- a list shall be rejected when the national selection procedure did not satisfy the minimum requirements of fairness and transparency or when the Panel was not properly consulted; we call this a rejection on procedural grounds;

- a list shall be rejected when "not all of the candidates fulfil each of the conditions" set by Article 21 of the Convention. We call this a rejection on substantive grounds; this reflects a certain tightening in comparison with the previous practice when the Assembly had occasionally accepted lists where one or two candidates did not fulfil the minimum requirements;

- the Assembly has also redrafted in clear terms the strict requirement that any list must have candidates of both genders except when the candidates are of the gender that is underrepresented among the judges of the Court, or when there are truly exceptional circumstances justifying an exception which must be supported by a majority of two-thirds of the committee on election of judges.

- and as a reflection of the closer cooperation with the Panel, the Chairperson or a representative of the Advisory Panel is invited to explain the reasons for the panel's views on candidates, during briefing sessions scheduled before the discussion on each list of candidates.

These are the main clarifications and changes of the rules decided in 2019. In practice, it can be observed that the committee on election of judges has become gradually stricter in applying these rules. For example, as regards gender equality, the committee recently rejected an all-male list despite the explanations given by the Minister concerned. A new list was subsequently put forward. In two earlier cases, both in 2012, all-male lists were still accepted by the committee.

The Committee has also become stricter in the application of the procedural requirement of a fair and transparent national selection procedure. It can be observed that the Committee pays more

and more attention to the Committee of Ministers' 2012 Guidelines and has rejected lists on procedural grounds when the Panel was not consulted properly, or there was no clear national selection procedure at all. In January 2021, the Committee also decided not to accept any more lists where candidates were not interviewed at the national level. This was announced in the Committee of Ministers by the then Secretary General of the Assembly. Meanwhile, the Assembly has also rejected a list on procedural grounds where the national selection procedure, whilst rather elaborate and transparent, was heavily dominated by representatives of the Government of the day.

Rejections of lists on substantive grounds, because not all candidates fulfil the minimum requirements are also not entirely uncommon. In fact, this translates to 5 lists of 27 lists the Assembly dealt with since January 2017.

In order to minimise the embarrassment both to the candidates and to the Governments concerned, the Assembly has adopted a practice that allows candidates to withdraw before the Assembly formally rejects the list. The meetings of the committee take place on the Thursday and Friday before the week preceding the Assembly session. In case the committee finds one or other candidate inappropriate, the Secretary General of the Assembly informs the Ambassador of the country concerned in confidence of the person or persons concerned who then have the possibility to withdraw their candidatures before the recommendation of the committee is made public on the Wednesday preceding the plenary session during which the election should take place. In this case, the election procedure is suspended until the Government has completed the list, again after consultation with the Panel. Then a new set of interviews with all candidates is scheduled and the election can take place during a later session, without the formal rejection of the initial list.

The need to protect the reputation of the candidates is also the reason why the results of the votes in the committee are published not in detail, but in a standardised, formulaic manner. Only the name of the candidate recommended as the most qualified is mentioned in the short note that is attached to the Bureau's Progress Report and thus becomes public. Without giving the actual number of votes received by each candidate, the committee merely agrees on a formula such as "unanimously", "by a large majority" (if over 2/3), "by a majority" or "by a narrow majority" (if the chosen candidate had only one or two votes more than the one in second place, depending on the total number of votes cast). When two candidates are very close whilst the third had very little support, the committee's report will also name the candidate who came second (''Mr/Ms X over Mr/Ms Y").

The way interviews are conducted is very structured. Each interview lasts 30 minutes, the first 5 of which candidates may use to introduce themselves. Then the chair asks one or two questions, the same ones for all candidates, followed by questions by Members. As many Members want to ask questions, candidates are advised to be concise in their answers. Candidates are invited to answer questions in blocks of two or three. They are allowed to take notes, but not to use other documents. The questions are varied and usually concern topical legal and human rights issues or "hypotheticals" where knowledge of the case law of the Court can be useful but is not indispensable for candidates to come up with a convincing legal argument. The committee members are all qualified lawyers and quite capable of assessing the candidate's answers, which are discussed in some detail in a "tour de table" among Members after each set of interviews and before the vote on rejection or preferences.

I should like to stress that the assessment of the candidates is not based only on their performance during the half-hour interview, but also, and to a large extent, by their CVs. A good interview cannot make up for a lack of professional experience at the appropriate level, as Sir

Paul would agree. This is the reason why the committee occasionally rejects a list on substantive grounds without even inviting the candidates for interviews when it is clear from the CVs, as assessed by the Panel, that one or more candidate(s) cannot reach the minimum threshold of competence and experience required for election to the Court. But it has also happened that the Panel found candidates acceptable "on paper" which turned out in the interview to be unable to sustain a legal conversation in either English or French, or to develop fairly basic legal arguments. In such a case, the Committee can reject a list on substantive grounds even if the Panel has found all candidates acceptable according to their CVs.

As to rejections of lists in the past five years, I have already given the figures in my earlier examples. Such rejections are rare, but they are sometimes necessary in order to ensure that the Assembly has a choice between three competent candidates, in accordance with the Convention.

Delays in the election of judges are first and foremost caused by Governments who do not present lists within the deadline set by the Assembly, namely six weeks before the second-last Assembly session before the end of the sitting judge's mandate. The Secretary General of the Assembly invites Governments well over a year before the expiry of the incumbent's term of office to launch the national selection procedure, giving detailed explanations of the requirements under the Convention.

There are many possible causes for delays in presenting a list in good time, including internal difficulties in setting up and carrying out an appropriate national selection procedure; then the necessary dialogue with the Panel, which may well require that the one or other candidate be replaced. This could require a repetition of the national selection procedure, unless (as would be my advice) the initial procedure has led to the identification of one or more "reserve" candidates. Once the list is transmitted to the Assembly, especially if it has received a positive assessment from the Panel, the procedure is actually quite fast: committee meeting 10 days before the Assembly session, publication of the recommendation on the Wednesday before the session, and election on the Tuesday or Wednesday of the session.

In my experience, the plenary Assembly almost always (and in the past five years, always) follows the recommendation of the committee. This I consider as also being the case when the committee recommends one candidate "over" a second one and the second one is elected, or when the committee recommends two equally qualified candidates and one of them is elected (as for the Danish list this week).

Regarding my take on the national selection procedures, I can confirm that there has been a steady improvement in most Member States, since the Committee of Ministers' "Guidelines" were published in 2012. Public calls for candidatures and Interviews of at least the most serious candidates are now standard – this was not always the case! - as are selection committees with impressive memberships. I am pleased that the Panel has also taken up the task of assessing the national selection procedure and clarifying any issues in its dialogue with governments. This helps the Assembly very much with its own assessment of these procedures.

One point I would like to stress towards the end of my intervention is the lack of any consequences when Governments simply do not transmit a list at all or keep transmitting unacceptable lists. The sitting judges then stay in office indefinitely. This may well suit the one or other Government, but it can seriously undermine the authority of the Court. In the Assembly, after an election, the national parliaments have six months during which they must replace their delegations. If they do not, they simply have no delegation anymore. Maybe it would be advisable to come up with a

mechanism that puts some pressure on Governments to submit acceptable lists of candidates in due time so that the judges' term of office under the Convention is not unduly stretched out.

Just some food for thought.

Let me conclude by stressing the need for all stakeholders – first and foremost, Governments, but also the Panel and the Assembly – to work together effectively, on the basis of mutual trust and good faith, in order to achieve our common goal, namely, to ensure that the most qualified, independent and impartial judges are elected to sit on the European Court of Human Rights. I am sure we can all agree that this is not something we should compromise on.

Thank you for your attention.

Speaking notes for the presentation by Sir Paul Mahoney, Chair of the Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights

1. Introductory remarks

First of all, thank you for the invitation extended to the Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights to contribute in a small way to the work of your drafting group.

The Committee of Ministers' Resolution of November 2010 setting up the Advisory Panel specifies the Panel's task as being to advise Governments whether candidates whom they are intending to propose for election to the Court meet the professional and personal qualifying conditions laid down in Article 21§1 of the Convention.

That said, I would start by confirming what Mr Corlatean, the Chair of the Parliamentary Assembly's Committee on the Election of Judges, has just said about the extremely positive relationship of cooperation between the Advisory Panel and the Assembly Committee. At the invitation of the Assembly Committee, the Panel has in practice also come to acquire a preparatory advisory role in relation to the Committee's consideration of the lists of candidates.

I turn now to the main matter, namely the Panel's interaction with the Committee of Ministers' Guidelines on the selection of candidates for the position of judge at the European Court of Human Rights. I will firstly give a descriptive presentation of how the Panel sees this interaction and then attempt to answer you query, Mr Chair, as to whether, from the Panel's point of view, any improvement in the present situation could be envisaged.

2. The Advisory Panel and the Committee of Ministers' Guidelines

The Panel's 5th activity report, adopted at the end of last October, recounts at different points the way in which the Guidelines are taken into account and influence its work. I therefore think, Mr Chair, that the best approach would simply be for me to take your drafting group through the relevant passages in the 5th activity report.

To begin with, in developing the criteria it uses for interpreting and applying in concrete cases the vaguely worded minimum qualifying professional and personal conditions stated in Article 21§1 of the Convention for being elected a judge on the Court, the Panel has regard, as one of its main inspirations, to the Committee of Ministers' Guidelines and the accompanying Explanatory Memorandum.[1]

Since the adoption of the Guidelines in 2012, the Panel has also taken it to be part of its task to advise on compliance with the additional "criteria for the establishment of lists of candidates" which are set out in section II of the Guidelines, notably as regards the linguistic proficiency of the candidates and the gender balance of the list.[2]

A similar development has occurred in regard to the selection procedure followed at national level.[3] Under the terms of the Guidelines, when sending its list of candidates to the Panel, a

[1] See paragraphs 2 and 34 of the 5th activity report.
[2] See paragraph 5 of the 5th activity report.
[3] As described in paragraphs 24 to 25 of the 5th activity report.

Government should also submit information on the national selection procedure.[4] The Panel has deduced from this requirement that, while it has no express power of review in this domain under the Resolution of 2010 setting it up, in its final views on the candidates it may, where appropriate, draw attention to aspects of the national selection procedure. A practice of including observations on the national selection procedure in appropriate instances has therefore been operated since the spring of 2019.

The two primary criteria employed by the Panel for assessing the national selection procedure are those set out in a Resolution of 2018 adopted by the Parliamentary Assembly's Standing Committee,[5] namely the criteria of fairness and transparency. The concrete aspects of the national selection procedure that the Panel, basing itself on the Committee of Ministers ' Guidelines, has so far looked at in different cases have included:

- the kind of qualifications, experience and qualities required of the persons applying for selection, including personal qualities such as independence and impartiality;

- the legal basis of the selection procedure followed, when the national selection procedure was established, where the rules establishing the national selection procedure were laid down and whether these rules were made public;

- the publicity given to the call for applications, in particular its wideness (especially when the number of applications was limited); for example, whether the call for applications was advertised in newspapers, circulated to university law faculties, courts, bar associations and so on or merely posted on one official government website;

- how many candidates responded to the call for applications and how many of these candidates were interviewed;

- the time-limit for responding to the call for applications; for example, whether it was just a couple of weeks during the summer holidays or over the end-of-year break;

- more generally, the efforts, or perhaps lack of effort, on the part of the Government to ensure that a sufficient number of good candidates of both sexes present themselves;

- the composition of the national selection body; in particular (a) whether the composition of the national selection body was balanced, with members coming from a variety of backgrounds (including some members nominated by independent entities such as bar councils, magistrates ' associations, non-governmental organisations and bodies representing the academic world and civil society) or (b) whether, on the contrary, the national selection body was packed with representatives of the Government, the political majority in Parliament and officials serving the Government;

- the procedure followed by the national selection body;

- the selection criteria applied at the national level and the transparency of those criteria;
the role played by government ministers or the Head of State in the finalisation of the list of candidates;

[4] Paragraph VI.2 of the Guidelines.
[5] Resolution 2248(2018).

- whether any complaints were made (including by candidates) about or in connection with the national selection procedure, and if so, how these complaints were dealt with by national authorities;

- the size and population of the country (where the number or quality of applicants in response to the call for candidatures was low);

- in the event of a single-sex list that does not include the under-represented sex (at present, the female sex), the relevant background circumstances insofar as they have a bearing on the issue of justifying such a derogation from the general rule of gender balance.[6]

3. Whether any improvement in the present situation can be envisaged

A few questions in this connection were put to me by Ambassadors when I was invited, as Chair of the Panel, to an exchange of views with the Ministers' Deputies at the end of November last year. Again, I think that, to reply to your invitation Mr Chair, a good approach would be to repeat to your drafting group the answers that I gave on that occasion.

Two linked questions concerned what was termed the "high proportion" of negative opinions from the Panel and the possible differences between the Panel and the Parliamentary Assembly Committee as regards assessment of the candidates.

In the three and a half years covered by the Panel's 5th activity report updated to last November, 15 out of a total of 54 candidates were assessed negatively by the Panel - that is, 28%. For its part, the Panel finds it disappointing that the Governments are presenting so many apparently under-qualified candidates lacking the depth and breadth of professional experience required: too many youngish, mid-career academics, not full tenured professors but only associate or assistant professors with no important publications; too many judges from lower courts; too many practicing advocates with no experience of the kind of issues that come before the Strasbourg Court.

This phenomenon of too many candidates on the borderline of satisfying the Convention's minimum qualifying conditions is particularly problematic in view of the fact that the judgments of the highest national courts may in effect be overruled by the judgments of the Strasbourg Court. If the Strasbourg Court were to be composed of too many inexperienced judges, the legitimacy and the authority of the Court's decisions are liable to be undermined in the eyes of the highest national courts – and also the national legislatures. This explains the care with which the Panel assesses the professional qualifications and experience of the candidates proposed.

The fact that there sometimes occur differences in assessment between the Panel and Assembly Committee is not a sign that the advisory vetting system is failing. Such differences are inevitable, given that the Assembly Committee has the benefit of being able to interview the candidates. Likewise, in the case of a candidate who is on the borderline, it is not necessarily worrisome that once in a while a Government should forward the list to the Assembly despite a negative opinion by the Panel. The system will be weakened if this happens too often and, especially, in relation to a candidate assessed by the Panel as being clearly unqualified (not at all on the borderline).

[6] See paragraph 64 of the 5th activity report as specifically regards the factors so far taken into account by the Panel when assessing whether " a Contracting Party has taken all the necessary and appropriate steps to ensure that the list includes candidates of both sexes meeting the requirements of Article 21§1 of the Convention" (see paragraph 35 of the Explanatory Memorandum to the Guidelines, quoting Parliamentary Assembly Resolutions).

Of course, the competent national authorities can be said to know their candidates better than the Panel does. But, as is stressed in the fifth activity report,[7] when it comes to making an evaluation of the different kinds of career paths and the depth and breadth of the candidates 'professional experience, the Panel seeks to be consistent in applying the Convention's minimum qualifying conditions from one list to another and to ensure equal treatment of all candidates, regardless of their country of origin.

One Ambassador asked how the selection process could be improved so as to eliminate doubts specifically as to independence and impartiality. I replied that one conceivable suggestion would be to improve the composition of the national selection body by making it visibly independent. Indeed, one of the standards set out in the Guidelines is that the composition of the national selection body should be balanced in the sense that it should be pluralistic, representing a variety of backgrounds and extending beyond government representatives or appointees so as to include genuinely independent members (persons nominated not by the government or the legislature but by entities such as the highest courts, judges' associations, bar councils, universities, non-governmental organisations and so on).[8] In practice this is not yet the case for many countries, but a truly pluralistic composition of the national body examining the applications received in response to the call for candidatures would be a visible safeguard as to the independence and impartiality of the candidates ultimately selected at the end of the national selection procedure.

The final question put to me, by the Icelandic Chair of the Ministers' Deputies, was whether I thought that it was the Guidelines or, rather, the practice of the Contracting States in this field that needed to be updated.

Of course, it does not fall within the Panel's remit to start proposing amendments to the Guidelines. The Panel's experience so far as regards the effect of the Guidelines, I replied, is that there are sometimes differences between the standards formulated in the Guidelines and the annexed good practices, on the one hand, and the way Governments actually structure their national selection procedures in practice, on the other hand. Generally speaking, there would doubtless be fewer negative assessments of the candidates by the Panel and fewer concerns expressed about the national selection procedure followed if the entities involved in the national selection process were to take more account of the standards, non-binding as well as binding, contained in the Guidelines. To that extent, the Panel's experience suggests that, overall, the process of selecting and electing judges could be improved if the practice of the States in implementing the Guidelines were improved.

[7] See paragraph 44 of the 5th activity report.
[8] See paragraph IV.1 of the Guidelines and paragraphs 48 and 49 of the Explanatory Memorandum to the Guidelines.

Prof. Dr. Helen KELLER, Chair for Public Law and European and Public International Law, Institute for International Law and Comparative Constitutional Law, University of Zurich

How to increase the independence and impartiality of the ECtHR's judges?

Prof. Dr. Dr. h.c. Helen Keller, Judge at the Constitutional Court of Bosnia and Herzegovina, Former Judge at the ECtHR

Preliminary remark

Whenever a person decides to apply for a position at the ECtHR, there are push and pull factors. If the total number of push factors is too great, good candidates may refrain from applying. From this point of view, I do not consider the recording of the interview advisable. Similarly, I believe that the requirement to take a language test at an age of around 50 would be more of a push factor. I would not recommend that either.

At the beginning and during the mandate

Increase the knowledge of judges before they start their mandate and during their mandate in order to make obvious what could be a danger for the impartiality (their posts on social medias, contact with the traditional media, contact with some officials that are in a wider contact with the government); develop a code of good practice for the judges in particular when they get in touch with journalists. Judges need to be trained for situations where they become victims of a media campaign, e.g. if they are in the middle of a shitstorm.

In certain countries of the Council of Europe, it seems to me that it is common for the government to call on the courts in sensitive cases and more or less dictate the outcome to them. It seems to me that judges who come from such countries and experience this situation at the ECtHR have little support and are somewhat at the mercy of this. Perhaps one would have to consider how to strengthen the backs of these judges. As long as we have states where the judiciary is not always independent, we will also have judges on the Court who are sometimes in a precarious situation.

After the mandate

Going back to owns country of origin after the end of the mandate is difficult. However, I think that there are no gender-based difficulties. [It is different when we look at the situation that arises at the election or at the beginning of the mandate. Here, studies show us that women are much more concerned with the family situation (childcare, school, work opportunities for the partner) than men.]

The difficulties are greatest where we have a potential conflict between the Court's jurisprudence and the human rights situation in a country. That's where people at home are usually disappointed with the judge at the ECtHR. This means that neither the government nor the national courts are very sympathetic to the idea of giving this judge an attractive position after the end of his or her mandate.

It goes without saying that there are enough means that state agencies can exploit to make a person's return a nightmare (I am thinking of criminal proceedings that are instigated without there really being any initial suspicion). I fear that as long as there are states that stand on unsteady ground in terms of the rule of law, judges cannot be protected against such attacks.

Smart, wise judges are certainly aware of the finite nature of their mandate. They are also aware that it is not easy to re-enter a professional environment after a nine-year break. This tendency is even likely to increase if the mandate is extended to 12 years. Judges with excellent professional qualifications will also find good job opportunities after the end of their mandate. The most difficult problem we have is with judges who are less qualified (e.g. in terms of language), who did not have a very good position before the mandate and who did not make a special name for themselves as judges at the ECtHR. For them, it is not easy to get a good position somewhere after the end of the mandate. To a certain extent, competition also plays a role here, which is probably right.

Finally, I believe that in any competitive environment, the saying: “les absents ont toujours tort” hold true. The candidates, e.g. who apply for a position at a supreme court in the national procedure have an advantage because they are at home. It is important to understand that whoever leaves his or her home country is not treated more favourably after nine years than someone who stayed at home. On the contrary: as an ECHR judge, many who have stayed at home regard you as someone who no longer belongs to the inner circle of valid candidates for a prestigious position.

I would not support a system in which former ECHR judges would automatically be given a position in a national supreme court. The quality of the judges is far too heterogeneous for that.

Ceterum censeo

Finally, I would like to add a *ceterum censeo*: It goes without saying that the ECtHR has an interest in ensuring that the best candidates make it to the ECtHR as judges. For this to happen, the election procedure would have to be improved in two ways: First, the selection of candidates should be more transparent at the national level. It seems problematic to me that excellent candidates are excluded without a justification (as was the case with the election of the last judge who serves in respect to Germany). This should be a warning signal for the panel that the three candidates on the ticket should perhaps be looked at again very carefully. Second, I think there should be rules on lobbing in the Parliamentary Assembly.

Let me conclude with this: the longer I work as a judge, the more I realise how difficult it is to guarantee, live and secure the independence and impartiality.

Prof. Kanstantsin DZEHTSIAROU, Professor in Human Rights Law and Associate Dean for Research of the School of Law and Social Justice, University of Liverpool.

Dear Ladies and Gentlemen, members of the Steering Committee for Human Rights,

It is my pleasure to be with you here today here today. Before I go into the core part of my presentation, I have to emphasise that electing the right people for the position of Judge on the European Court of Human Rights is crucial, it is enormously important for the reputation and legitimacy of the Court and the whole system of human rights protection. It is also hugely important how those judges behave during their mandate and even after their mandate has expired. Electing the wrong people can undermine the enormous effort of the other Judges and Lawyers of the Court.

Another remark that I wanted to make before beginning my contribution related to something that Senator Corlățean suggested. As far as I understood, he proposed to punish the state for delaying the election of new judges by removing the sitting judge elected in respect of that state from the Court. I think that this suggestion should be carefully considered before any action is taken as the lack of judge could be something that the state might actually prefer. There are examples of courts from different jurisdictions which were unable to function because the states failed to appoint new judges to the bench. At the end there were simply no judges to deal with the cases.

In my short intervention I will first focus on three brief points: the professional background of the judges of the ECtHR, then I will overview the national election mechanisms and finally I will approach a particular issue of transparency of the interview process at the level of the Parliamentary Assembly.

First, in the paper that I published together with political scientist Alex Schwarz in German Law Journal we argued that there are three ideal types of judges: judge technician, judge philosopher and judge diplomat and these ideal types are generally associated with their professional background: academic, judicial or other legal practitioners.[9] Judge technicians effectively focus on the adjudicatory function of the ECtHR,[10] namely sorting out the conflict between people and the state over human rights in a civilised manner. The philosophers are more concerned about the strategic development of the case law, the bigger picture in which the Court is operating. This is the meta-function of the Court. The diplomat is more concerned with the executability of the judgments and ensuring the effectiveness of the system. As I said, the types are ideal and there is hardly any judge who would fall squarely in only one of these categories, but our argument is that the professional background is important and makes a difference.

In our paper we pointed out that the selection should maintain the proportion of all relevant professional backgrounds. At some point I had the impression that 'national judges' – that is, judges who have sat on domestic courts - were really preferred by those selecting the ECtHR judges, which is perhaps understandable. However, it would be a very different, and certainly less pluralistic court if there are only former national judges on the bench. The European Court of Human Rights is not a national court, so different types of competencies and skills are needed there.

[9] Dzehtsiarou K and Schwartz A, "Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why It Matters" (2020) 21 *German Law Journal* 621.
[10] For the discussion of functions of the ECtHR see, K Dzehtsiarou, Can the European Court of Human Rights Shape European Public Order? (CUP, 2021), chapter 4.

How is it possible to ensure that the judges have varying professional backgrounds? The committee should be informed about the current state of affairs in terms of gender balance, skillset and professional background by the Secretariat and they also need to be informed as to how the composition would change if there is another judge, lawyer or academic added to the bench. The states should be encouraged to submit lists with people of varying professional backgrounds. Some inspiration can be taken from the process employed by the CPT where, I understand, the President of CPT informs the CM about the expertise lacking in the composition. I am not aware of any similar system in relation to the Court.

Second, I am not going to make a ground-breaking discovery when I say that the reforms really should look at the domestic selection process because this is where the key problems and challenges can happen. On the level of national selection, the state can choose from a very high number of potential candidates. Subsequently, the PACE must select from a list of only three candidates. Often the problem is the ad hoc approach to selection, the absence of criteria for the members of national selection committee, and the significant variation in how determinative the decision of the selection panel is. The need for the new procedure every time the vacancy opens in Strasbourg can lead to delays in submitting the list of three candidates to the PACE as this procedure needs to be approved and created as new.

Of course, the states are sovereign in establishing their own laws and setting out the procedure to be following in nominating judges. Having said that, states have voluntarily agreed to comply with the Convention *bona fide* and to nominate the most qualified candidates. It is a core part of the object and purpose of the Convention to create an independent and highly qualified court. In order to support national selection processes, the Council of Europe can encourage adoption of the best practice procedures based on decades of experience. It can be done through adopting a model law on the selection of the ECtHR judges, for instance. Of course, it should not be expected that such a model law would be copy/pasted by member states, but they could consider to adopt a version of it or use it as inspiration. This could help states in a very practical way, to create a stable and fair procedure. Of course, the implementation of such a law also needs to be fair and consistent. but even having a law like this in place would be a helpful first step.

The Council of Europe could potentially offer consultative and advisory services to the ECHR contracting parties regarding the process of selecting judge-candidates. It would perhaps be helpful if states knew that they have access to established experts in the field to provide them with independent advice, guidance and support in relation to the process of selecting and nominating judge candidates. These consultants should be knowledgeable about the procedure and the competencies required for ECtHR judges, and they could provide a level of oversight regarding national procedures which could be reported to the PACE committee responsible for the election of judges. The former members of the Panel for the election of judges could act as such experts, for instance.

Finally, the improvement that I would suggest at the level of the PACE is the live transmission of the interviews. Five or six years ago, I took part at a similar meeting in Riga organised by the PACE. I argued there that the interviews should be broadcasted live or made public with some delay. This will significantly increase the transparency of the process and would deter candidates who are clearly not up to the job from applying. In response it was argued that such interviews might deter good candidates from applying, as judges are not used to public speaking. There is simply no empirical evidence that transparency deters good candidates from applying. Moreover, one should perhaps expect that a judge of one of the most important courts in Europe has the ability to speak publicly and make their point orally. Every examination or review might have a chilling effect on potential candidates, but it does not mean that such reviews should not be undertaken, moreover, it can have quite an opposite effect and actually attract only best

candidates. So, here I would like to emphasise the need to continue discussing the possibility of broadcasting the interviews live or with some delay.

Thank you very much for your kind attention.

Kanstantsin Dzehtsiarou