Editorial

Reforming the Election Process of Judges of the European Court of Human Rights

1 Introduction

The idea for the editorial notes of this issue of the *ECHR Law Review* originated from the meeting of the Steering Committee for Human Rights (CDDH) drafting group that took place in January 2023 in Strasbourg, in which I participated. The drafting group was instructed to evaluate the effectiveness of the selection of the Judges of the European Court of Human Rights (ECtHR or Court). This issue hosts three excellent guest editorial notes. First, the Chair of the Drafting Group on Issues Related to the Judges of the ECHR, Hans-Jörg Behrens, explains the role of this drafting group in detail. Then, the now former chairperson of the Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights (Advisory Panel), Paul Mahoney, considers the Strasbourg system of election of Judges with a special emphasis on the Advisory Panel and its working methods. Finally, the former Judge of the ECtHR, Helen Keller, takes a more substantive view on the process of the election of Judges and reviews it from the perspective of ensuring independence of both candidates and elected Judges.

In my editorial, I reflect on some of the points made in all three editorials, but my overall aim is not to discuss or analyse them in detail. Instead, I am going to share my opinion on some aspects of the reform of the election of the ECtHR Judges. This editorial note is an elaboration of my presentation at the January meeting of the CDDH drafting group. I will first present a snapshot of the current composition of the Court, focusing mostly on the gender and professional backgrounds of the Judges. Then, I will reflect on some potential reforms of the process of the election of the ECtHR Judges, primarily looking...
at the delays in electing new Judges, stability and predictability of domestic selection procedures, and transparency of the interviews in Strasbourg.

2 The Composition of the Court

Judges of the Court are human beings; and as all other humans, Judges differ between them. They have different life experiences, political views, education, and personal background. Some Judges specialise in a particular area of human rights law, some of them are more committed to a particular legal and political ideology. Although all Judges are different, there are a few things that they should have in common: they should be leading independent experts in human rights law. Despite the fact that the judgments of the Court are usually drafted by the Registry lawyers, the Judges make the key decisions and they are normally seen as the face of the Court. So, having competent, independent, and credible Judges is crucial for the quality, authority, and legitimacy of the Court. Electing the wrong people as Judges can undermine the enormous effort of the other Judges and lawyers of the Court.

I will now briefly consider the current composition of the Court to see where the reform efforts might be appropriate to enhance the diversity of the bench. There are 46 Judges at the Court, one from each of the contracting parties to the Convention. Currently, the longest serving sitting Judge is Judge Wojtyczek of Poland. He took office on 1 November 2012 and at the time of writing on 27 July 2023, he has been on the bench for almost 11 years, with no prospect of being replaced soon. This is due to the fact that the Polish authorities keep failing to submit an appropriate list of three candidates.¹ The most newly elected Judge is Sebastian Rădulețu of Romania. Currently, there are 30 male and 16 female Judges; in 2022, the ECtHR Judges elected the first female President – Judge Síofra O’Leary of Ireland. The gender imbalance of the ECtHR has been under consideration for many years. Now, the states are obliged to submit a list which includes at least one candidate of the underrepresented gender,² and so far, it has always been the female gender. However, as the above numbers show, these measures are not very successful in ensuring the balanced representation

¹ The PACE Committee has already rejected three lists submitted by the Government of Poland: <https://rm.coe.int/forthcoming-elections-for-judges-country-by-country-january-2023-/1680aa6ac>.
of genders. There are states which have never sent female Judges to the Court, including some founding members such as the UK and France. This does not mean that the lists submitted by these countries did not include female candidates, but they have never been subsequently elected by the Parliamentary Assembly of the Council of Europe (PACE). It seems that the efforts to balance the gender of the Court should continue, if not intensify.

There are plenty of other criteria according to which one can analyse the Court’s composition. In the paper that I published together with Alex Schwarz, we argued that there are three ideal types of Judges: Judge technician, Judge philosopher, and Judge diplomat. These ideal types are generally associated with their respective professional background: academic, judicial, or other legal practitioners. Judge technicians effectively focus on the adjudicatory function of the ECtHR, namely sorting out the conflict between people and the state over human rights in a doctrinally sound manner. The philosophers are more concerned about the strategic development of the case law, the bigger picture in which the Court is operating: namely, with the meta-function of the Court. The diplomat is more concerned with the executability of the judgments and ensuring the effectiveness of the system. 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.

I reviewed the cvs of all 46 currently sitting Judges of the ECtHR with the view of establishing their professional backgrounds. I had to adopt certain necessary simplifications in this regard. For instance, I have only taken into account their profession before being elected to the Court; in some cases, I also made an assessment of their primary professions, as some Judges were occupying multiple roles before their election. For the purposes of comparison, Schwarz and I conducted a similar exercise in 2018 and we pointed out that there was parity between the number of academics and judges on the Court (figure 1, representing percent of all 47 Judges on the bench in 2018, was taken from the paper by Schwartz and Dzehtsiarou).3

---

5 For a more nuanced discussion of the functions of the ECtHR, see, K Dzehtsiarou, Can the European Court of Human Rights Shape European Public Order? (Cambridge University Press 2021) Chapter 4.
7 Dzehtsiarou and Schwartz (n 4) 640.
For 2023, I simplified the enquiry somewhat; I kept the categories of Judges, Academics, and Mixed, but all other roles, including diplomatic positions and governmental roles, I located in the miscellaneous category. This is how the Court looks in 2023 – see figure 2 below.

The number of academics on the bench remained almost the same, but the number of Judges with judicial backgrounds increased significantly. Out of the latest 20 elections, only two elected Judges can be predominantly characterised as practicing lawyers. Overall, the number of non-academics and non-Judges on the bench lowered considerably. Therefore, the most common path to the bench in Strasbourg is via supreme/constitutional national courts or through university professorships. Moreover, there is some link between the geographical area and the professional backgrounds of the elected Judges. If you are from Northern Europe, perhaps your only way to become an ECtHR Judge is through the national judiciary. In Norway, Finland, Iceland, and the Netherlands, the current Judges of the Court are former national Judges. Only Sweden, wherein the elected Judge was the Director-General of the National Council for Crime Prevention, which is not strictly speaking a judicial position, differs. In Eastern and Southern Europe, academics have much better chances of being elected to the bench in Strasbourg. The vast majority of Judges from these regions are university professors.

In our paper, Alex Schwartz and I pointed out that the procedure of the election of the ECtHR Judges should maintain the proportion of all relevant professional backgrounds. In the last 5–10 years, I had the impression that ‘national

---

8 Judge Darian Pavli, elected in respect of Albania, and Ioannis Ktistakis, elected in respect of Greece.
Judges’ – that is, Judges who have sat on domestic courts – were preferred by those selecting the ECtHR Judges. It would be a very different, and certainly less pluralistic Court if there were only former national Judges on the bench. It seems that at least to some extent, my ‘impression’ can be substantiated by the numbers presented above. The ECtHR is not the same as a national court, so different types of competencies, skills, and professional backgrounds are needed there. It is therefore crucial that the professional diversity of the bench is considered during the elections of Judges.

How is it possible to ensure that the Judges have varying professional backgrounds? The Committee on the Election of Judges to the ECtHR⁹ should be informed about the current state of affairs in terms of gender balance, skillset, and professional background by the Secretariat of the Committee, and they also need to be informed as to how the composition would change if there is another Judge, practicing lawyer, or academic added to the bench. Of course, the merits of the candidates should be of paramount importance, but the professional background can also be taken into account. The nominating states should also be encouraged to submit lists with people of varying professional backgrounds. Some inspiration can be taken from the process employed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),¹⁰ where the President of the CPT informs the

---


Committee of Ministers, which appoints the members of the Committee, about the expertise lacking in the composition. Although the nature of the CPT is different to the one of the Court and the variety of expertise (lawyers, psychiatrists, and medical doctors) is more crucial for the former, the latter can also benefit from a balanced spread of visions and approaches.

3 The Process of the Election of Judges

In this section, I will consider three aspects of the elections of the ECtHR Judges, namely, the delays in submitting the nominations from the Contracting Parties, the stability and predictability of domestic procedures, and the transparency of the assessment of candidates in Strasbourg.

One of the issues that the Strasbourg organs have to face in the context of election of ECtHR Judges is the delays in submitting the list of nominated candidates. If there are then further issues with the lists, for instance they might be ‘rejected’ either by the Advisory Panel or the PACE Committee, this creates long delays in appointing new Judges. For instance, the former Ukrainian Judge, Ganna Yudkivska, stayed on the bench for almost 3 extra years after the expiry of her mandate because the Ukrainian authorities were first late and then could not submit a list meeting the requisite criteria. The fact that the sitting Judge can continue working on the bench in Strasbourg while the new Judge is elected is hugely beneficial for the Court. The national Judge should participate in Chamber and Grand Chamber cases against their state; the absence of a national Judge, especially from a high-count state, can complicate the operation of the Court. There are examples of courts from different jurisdictions that were unable to function because the states stopped appointing new judges to the bench. So, the ability of the Judges to continue dealing with cases after their mandate is over is an important safeguard of functionality


and independence of the Court. That said, the states need to be encouraged to submit the list of candidates on time.

The Committee for the Election of Judges regularly updates the schedule of the majority of elections\textsuperscript{14} and the moment when the list needs to be submitted is known in advance. The states just fail to organise the national selection in a timely fashion. Of course, it would be ideal if the Committee could apply financial sanctions for the delays in submitting the lists, but in practice this idea might not be supported by the Committee of Ministers. Some lighter forms of encouragement might include the rule that only the representatives of the states who submitted their lists on time can participate in the work of the Committee for the Election of Judges or other similar mechanisms.

Second, I am not going to make a ground-breaking discovery when I say that the reforms should primarily look at the domestic processes of selection of candidates because this is where the key challenges are. On the level of national selection, the state can choose from a very high number of potential candidates. Conversely, the PACE must select from a list of only three candidates submitted by the state. Often the problems are in the \textit{ad hoc} approach to selection at the national level, the absence of clear criteria for appointment of the members of the national selection panels, and the significant variation in how determinative the decision of the selection panel is in putting together the final list of three names.\textsuperscript{15} The need for the adoption of a new procedure every time a judicial vacancy opens in Strasbourg can lead to delays in submitting the list of three candidates to the PACE.

Of course, states are sovereign in establishing their own laws and setting out the procedure to be followed in nominating Judges. Having said that, states have voluntarily agreed to comply with the Convention \textit{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. This can be done through adopting a model law on the selection of the ECtHR Judges, for instance. It should not be expected that such a model law would be blindly followed by member states, but they could consider adopting a version of it or use it as inspiration but maintain discretion as to the specific modality they choose to adopt. This could help states in a very practical way, to create a stable and fair procedure. The implementation of such a law also needs to be

\textsuperscript{14} Unexpected elections due to dismissal or early retirement of a Judge happen very rarely.

\textsuperscript{15} In many countries, the panel suggests the names but the final determination is made by the Ministry of Justice or the Ministry of Foreign Affairs.
fair and consistent, but even having a law like this in place would be a helpful step.

The Council of Europe could potentially offer consultative and advisory services to the ECHR contracting parties regarding the process of selecting candidates. It would perhaps be helpful if states could request independent advice, guidance, and support in relation to the process of selecting and nominating 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 Advisory Panel could act as such experts, for instance.

Another way of encouraging accountability is the creation of a network of national NGOs who would be able to review the process of the nomination of candidates and collate the reports from various sources on the particularities of the elections assisting the Panel and the PACE committee. This network could function in a similar way to how the European Implementation Network, which supports the Council of Europe’s work in implementing the ECtHR judgments, is organised.

Finally, some improvements are still possible at the level of Strasbourg organs. My key objective here is increased transparency of the selection in Strasbourg. I agree with the framework that Helen Keller adopted in her note, namely that there are ‘push and pull factors’ for good candidates to apply for the position of the ECtHR Judge. The reforms should maximise the push factors, but I am convinced that transparent procedures should not be seen as a factor that would prevent qualified candidates from applying. Both the Advisory Panel and the PACE Committee can enhance the transparency of their operation, but to keep this note relatively short, let me focus on the Committee’s interviews only.

I would argue in favour of the live transmission of the interviews of the candidates in Strasbourg. Alternatively, in order to protect privacy, the interviews can be broadcast with a couple of hours of delay, like the hearings of the ECtHR. This will significantly increase the transparency of the process and can perhaps deter some candidates who are clearly not up for the job from applying. It has been argued that such open interviews might deter good candidates from applying, as Judges, especially in civil law legal systems, are not used to public speaking. I would respectfully disagree with such argument. One should perhaps expect that a Judge of one of the most important courts in Europe has the ability to speak publicly. Every examination or review might have some

16 <https://www.einnetwork.org/>.
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 the best candidates.

4 Concluding Remarks

The Court is as good, authoritative, and legitimate as its Judges are. It is crucial for the effectiveness of the ECtHR to elect the very best lawyers to the Strasbourg bench. Over the years, excellent lawyers have served on the Court. However, the election process can always be improved, made fairer, and more transparent. The Court can be a better reflection of the European societies, more balanced in terms of gender and professional backgrounds. In order to achieve this, the Council of Europe should work together with the member states to improve the rules governing elections, making them more predictable and transparent.

Kanstantsin Dzehtsiarou
Professor in Human Rights Law, University of Liverpool, Liverpool, United Kingdom
Editor-in-Chief of the European Convention on Human Rights Law Review
k.dzehtsiarou@liverpool.ac.uk