The Status of Judges: Intergovernmental Work on the Evaluation of Issues Relating to the Judges of the ECHR

1 Introduction

The authority of any international court depends to a large extent on the qualities and professional stature of its judges. The selection and election process of those Judges is therefore one of the most important elements of the foundations of the system of the European Convention on Human Rights (ECHR or Convention). The same can be said of the Judges’ conditions of service, including the length of their mandate, and the issue of recognition of their service at the Court once their mandate is finished. It is primarily the responsibility of the High Contracting Parties to the Convention to regulate these procedures and criteria in order to guarantee the highest quality of the judiciary at the Court. However, the Convention, decisions of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE) create the legal framework within which the High Contracting Parties are operating.

This task of overseeing the system of the European Convention on Human Rights falls in practical terms mainly to the Steering Committee for Human Rights (CDDH)\(^1\) of the Council of Europe, which in turn reports to the Committee of Ministers. The CDDH is an intergovernmental body which is composed of delegates from all member states, along with a number of

\(^1\) For further information, please see: <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/home>.
observers, including civil society organisations. It could perhaps be compared with an assembly of states parties to the Convention.²

The CDDH meets twice a year in Strasbourg and discusses issues related to the reform and improvement of the system of human rights protection in Europe. It has a number of subordinate bodies that work on specific topics for a limited period of time, along with a permanent subordinate Committee of Experts on the System of the European Convention on Human Rights. The CDDH gets its terms of reference from the Committee of Ministers, which every four years identifies the topics the CDDH is focusing on. It is however possible to take up urgent issues under the general task of ‘work on the protection, development and promotion of human rights in Europe’.³ The CDDH can create Drafting Groups which would be entrusted with working on one of the specific issues of the reform of the system. These groups then prepare reports and suggest amendments of the system. This note will first consider the ongoing work of CDDH in the area of the election of Judges and then outline the activities of the Drafting Group, which was specifically created to look at the election of Judges. The final report of this Group is not yet ready and therefore its full presentation is impossible here. Instead, this note highlights the areas where possible improvements might be suggested.

2 The CDDH Work on the Election of Judges of the European Court of Human Rights

The work of the CDDH on the election of Judges of the European Court of Human Rights (ECtHR or Court) is based on the Report on the Longer-Term Future of the System, which it prepared in 2014–2015.⁴ The Committee of Ministers welcomed this report in March 2016.⁵ In the context of the report, the Committee of Ministers:

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deemed it essential that the judges of the Court enjoy the highest authority in national and international law and to this end instructed the CDDH to examine, while securing the participation of the Court and all other relevant actors concerned, the whole selection and election process, including all factors that might discourage possible candidates from applying...

The CDDH followed this instruction by setting up – together with other Groups dealing with other aspects of the longer-term future of the Court – a Drafting Group looking specifically at this aspect of the report. This Drafting Group met four times in 2016 and 2017, and on 9 November 2017 adopted a draft Report on the Process of Selection and Election of Judges of the European Court of Human Rights.

The Drafting Group identified four main areas for its analysis: a) the national selection procedure; b) the election process in the PACE; c) the conditions for employment and working conditions at the Court; and d) ad hoc Judges. In its report, the Drafting Group concluded that there was room for improvement in all four areas identified in the report within the framework of the existing structures of the Council of Europe and the Convention system. The possibility of amending the Convention was, however, not excluded.

This report was transmitted to the Committee of Ministers at the end of 2017. On its basis, the Committee of Ministers examined the system of selection and election of Judges in consultation with relevant stakeholders between June and October 2018, and adopted its decisions in January 2019. At the end of 2018 and beginning of 2019, the PACE undertook a series of procedural changes regarding the election of Judges of the Court. Among these changes, for instance, was the fact that now the reasons for the rejection of national candidates’ lists are specified in the decisions of the Committee on the Election of Judges.

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6 Ibid No 7.
Judges to the ECtHR of the PACE, and stricter requirements for voting in the Committee were also introduced.

In 2022, another Drafting Group was set up within the CDDH; it was instructed to prepare a:

[report evaluating the effectiveness of the system for the selection and election of the [European Court of Human Rights] (“the Court”)’s judges and the means to ensure due recognition for judges’ status and service on the Court and providing additional safeguards to preserve their independence and impartiality.]

At the same meeting, the CDDH exchanged views with the then President of the Court, Robert Spano, who urged the CDDH to consider the possibility of an extension of the Judges’ mandate from 9 years to 12 years. The CDDH concluded that this was feasible under the new Drafting Group’s terms of reference. The Drafting Group has, therefore, added the question of the length of the Judges’ mandate to the issues to be covered by its report. In 2022, the Drafting Group commenced its work to prepare a report evaluating the effectiveness of the system for the selection and election of the Court’s Judges and the means to ensure due recognition for Judges’ status and service on the Court, and providing additional safeguards to preserve their independence and impartiality.

The fact that the CDDH wished to revisit the issue of election relatively soon after the previous report is due to several factors. First, there have been concerns about the lack of candidates with long experience at the highest judicial level. Second, in few cases, some former ECtHR Judges seem to have

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11 Only those committee members who have been present at the interviews are entitled to vote; the committee members from the state whose candidates are under discussion may not vote.

12 Steering Committee for Human Rights, ‘Report’ (11 July 2022) CDDH(2022)R96, No 12ff. Drafting Groups of the CDDH may be attended by delegates from all member states. Armenia, Azerbaijan, Finland, France, Italy, the Netherlands, Poland, Switzerland, Türkiye, and the United Kingdom have been nominated as members, which means that these ten states are expected to participate while all others can participate if they specifically take interest in the subject matter. In case of this Drafting Group, many other member states have attended at their own expense.

13 Ibid Appendix III.

encountered difficulties of various kinds upon return to their home country at the end of their mandate. Finally, some changes in the election procedure have taken place and their effects needed to be evaluated.

The ‘new’ Drafting Group has to date met three times, in September 2022 and in January and May 2023. At its second meeting in January 2023, it held an exchange of views with Mr Titus Corlătean,\textsuperscript{15} Sir Paul Mahoney,\textsuperscript{16} Professor Helen Keller,\textsuperscript{17} and Professor Kanstantsin Dzehtsiarou.\textsuperscript{18} At its third meeting in May 2023, it held an exchange of views with Judges Lado Chanturia and Tim Eicke, representing the Court.

In order to substantiate its analysis with fact-based information and widen the foundation of its report, the Drafting Group has also invited former Judges of the Court to send their views on issues concerning the exercise of their mandate. The Group has also attempted to gather information from actual and potential applicants in the national selection procedures on issues encountered in the context of such procedures. Questionnaires were distributed via several networks; as a result, the Drafting Group received responses from 20 former Judges, 91 responses from potential applicants, and 58 responses from actual applicants at the national level. These responses have been received in anonymised form. The aim of this exercise is to identify the key difficulties in attracting and choosing the best candidates for the position of Judge at the ECHR.

3 Preparation of the Report by the Drafting Group

The work of the Drafting Group covers five main areas: a) the national selection procedure; b) the election procedure; c) issues related to Judges’ active time in office; d) post-mandate recognition of service on the Court; and e) ad hoc Judges. For each theme, the Drafting Group will analyse the key decisions and measures taken at the last review process, developments and new challenges that became apparent since then, and finally endeavour to make some

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  \item \textsuperscript{17} Chair for Public Law and European and Public International Law, Institute for International Law and Comparative Constitutional Law, University of Zurich.
  \item \textsuperscript{18} Professor in Human Rights Law at the School of Law and Social Justice, University of Liverpool. The editorial notes of Professor Keller, Sir Paul Mahoney, and Professor Dzehtsiarou to this Issue are vaguely based on their presentations at the meeting.
\end{itemize}
proposals as to how to further strengthen the system of selection and election of Judges of the Court.

3.1 National Selection Procedure

As far as the national selection procedure is concerned, any recommendations would have to be addressed to the High Contracting Parties to the Convention. They are, according to Article 22 of the Convention, solely responsible for the selection of three candidates to be placed on the list transmitted to the PACE. The states parties are expected to implement the standards set out in the Guidelines on the Selection of Candidates for the Post of Judge at the European Court of Human Rights (the Guidelines).¹⁹ This part of the Group's analysis will also have to include the role of the Advisory Panel that was set up by the Committee of Ministers to advise the state parties on the suitability of the candidates they intend to put forward for office as Judge. Following a confidential procedure, the Panel decides whether it considers that all the candidates meet the criteria stipulated in Article 21(1) of the Convention. The Panel's views are not binding upon the states parties, but they are expected to take them duly into account. The Panel also advises on whether the national selection procedure, information about which the governments have to provide along with the candidates' CVs, is in line with the Guidelines. In light of the dialogue with the Chairman of the Panel, the Drafting Group will evaluate the development of the Panel's practice and the experience with the Guidelines.

3.2 Election of Judges by the Parliamentary Assembly

As to the election procedure, this takes place under the sole responsibility of the PACE, in accordance with its Rules of Procedure. The Committee on the Election of Judges to the ECtHR first assesses the list of candidates presented by the states parties and the national procedure used to select them. After this, the Committee expresses their views as to the appropriateness of the list and their preferred candidate or candidates. Finally, the Plenary Assembly proceeds to elect one of the three candidates. Although the primary interlocutor for the Advisory Panel is the relevant state party, the relations between the Committee on the Election of Judges and the Panel have developed during recent years, resulting in improved communication between them. The Drafting Group will examine the current situation and the overall structure of the process, which was amended by the PACE in 2018/19.²⁰


²⁰ PACE (n 9).
3.3 **Judges’ Time in Office**

When looking at issues related to Judges’ active phase in office, the Drafting Group will include the question of the length of the term of office which was brought up by the Court. Clearly, any changes to the term of office would require an amendment of the Convention itself. That means that even if there were recommendations to that effect, they would become relevant only in the long term. Having said that, it is clear that there are substantial arguments in favour of a 12-year term of mandate as presented by President Spano. The Drafting Group will have to discuss this proposal as well as possible alternatives designed to achieve the goal of better continuity in the Court’s leadership.

The Drafting Group will also have to analyse whether practical considerations, such as the difficulties of moving a family to Strasbourg (or alternatively maintaining two households), the working conditions at the Court, issues of insurance and pensions, etc., may act as a barrier for promising candidates and whether there are ways to diminish any such difficulties. The exchanges with the Court will help to identify the most pressing needs and potential solutions. However, many possible improvements, particularly to the working conditions at the Court, such as an increased number of assistants or translators, will require more funding. Others, like easier access to international schools, cannot be achieved directly by Council of Europe action.

Under this heading, the Drafting Group will also discuss safeguards for the preservation of the Judges’ independence and impartiality. This is a particularly sensitive topic, since there is an ongoing campaign in the media and in the PACE which aims to delegitimise the Court and to detract from the credibility of its judgments by employing what can only be described as a smear campaign against individual Judges.21 The Committee of Ministers has so far been very clear in its rejection of these allegations.22 The underlying rationale of the authors in a nutshell is that anyone who has defended human rights in their pre-Court career is unfit to sit as a Judge of the ECHR, as being ‘not impartial’. This kind of argument does not merit discussion in an academic journal, but it is important that the Drafting Group’s deliberations and findings are not twisted by the authors of this campaign for their goals, namely by claiming for

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21 This campaign follows similar attempts in the UN-context. See, for an analysis, M Scheinin, ‘NGOs and ECHR Judges: A Clarification’ (EJIL:Talk!, 13 March 2020): <https://www.ejiltalk.org/ngos-and-echr-judges-a-clarification/>. It also follows well-known conspiracy narratives. Interestingly, the campaign has the wholehearted support of the Russian Federation. See: <https://twitter.com/CoE_Russia/status/1651850366462447616>.

example that the Council of Europe has found it necessary to set up a working group to deal with their allegations.

3.4  **Post-Mandate Life of Judges**

The Drafting Group will consider the post-mandate recognition of Judges’ service at the Court from several angles. The question of post-mandate immunity and protection against reprisals, including mandate-related litigation, will have to be considered, taking into account the responses received from former Judges at the Court. Any form of reprisals against former Judges of the Court with respect to their judicial activities is, of course, wholly unacceptable, and reports of such reprisals deserve immediate attention by the states parties. It is already cause for concern that this issue needs to be explicitly examined.

Post-mandate recognition of service requires the proper consideration of the term served at the Court for the purposes of career advancement or further service in national institutions. Given the diversity of professional backgrounds and legal environments in all member states, it is difficult to find general solutions for the specific challenges that may arise in the individual setting of a particular case. However, recognition of service as Judge is a key element for the attractiveness of the position of a Judge at the Court. It also has an impact on the independence of Judges since their professional and material situation upon return to their home countries should not depend on the goodwill of national authorities.

3.5  **Ad Hoc Judges**

Finally, the position of the ad-hoc Judges will be discussed. Ad hoc Judges are appointed when the Judge elected in respect of the respondent state for some reason cannot sit in a Chamber or Grand Chamber. States are expected to submit a list of ad hoc Judges from which the president of the Section or the Court can select one for a particular case. Since the last review, there have been some changes to the rules, most importantly an extension of the validity of the lists with the names of ad hoc Judges (four years instead of two). Furthermore, after the Russian Federation was expelled from the Council of Europe, many pending cases against it have still to be heard and decided. In this context, the rules on ad-hoc Judges have also come sharply into focus. Since there is no longer a Judge elected in respect of the Russian Federation – and the persons on the list of ad-hoc Judges submitted by the Russian Federation under Article 26-4 of the Convention are no longer available either – the President has decided to appoint one of the other Judges of the Court instead as an ad hoc Judge. This practice will be considered by the Drafting Group.
Conclusion

It is envisaged that the Drafting Group will meet two more times, in September 2023 and in spring 2024, and after that come up with a final report. This report will be transmitted to the CDDH for adoption – probably in June 2024 – and then forwarded to the Committee of Ministers. Any recommendations from the report will in all likelihood be addressed to the state parties of the Convention, to be taken up either individually or collectively through the Committee of Ministers.

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