How to Improve Independence and Impartiality of Judges of the European Court of Human Rights

The notion of judicial independence has been under attack for just as long as it has been hailed as an ideal. Courts across jurisdictions at all levels must be alert to resist such threats. This goes for the European Court of Human Rights (ECtHR or Court) as well. Judicial systems, by design, face inherent trade-offs, and the design of the Court seems to prize independence and impartiality whilst accepting reduced levels of accountability. Elsewhere, I have endorsed such a normative preference. While the institutional framework underlying the Court creates a solid foundation for a relatively high level of judicial independence, it is unreasonable to expect that such independence will be completely immune to any challenges that may arise. This contribution considers certain issues affecting the current system, and offers solutions to help maintain the independence and impartiality of Judges throughout their career at the ECtHR.

In what follows, I will remark on what improvements are necessary in the process of electing the Court’s Judges. I will then argue that training Judges in issues relating to the institutional loyalty expected from them, both at the beginning of and during their mandate at the ECtHR, is a tenable solution to protect judicial independence and impartiality. Moreover, I will argue that changing the rules pertaining to the appointment of the President of the Court can promote the viability and long-term interests of the Convention system, and I will make proposals to that end. Finally, I highlight the importance for Judges to remain vigilant about the potential difficulties of re-entering a professional environment in their home country or elsewhere at the end of their mandate.

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**Election Process**

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 in practice, the election procedure would have to be improved in two ways. First, in some countries the process at the national level, preceding the selection by states of their three candidates, should be more transparent.3 It seems problematic to me that excellent candidates may be excluded without justification.4 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, virtually no information about the internal mechanics of the election process within the Parliamentary Assembly of the Council of Europe (PACE) has been made public.5 In this regard, while it is impossible to completely eliminate lobbying and political deals from influencing the process, there should be rules on lobbying in the PACE.

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**Independence at the Beginning of and During the Mandate**

Judicial independence and impartiality of the ECtHR Judges could be further promoted through refining and improving the selection procedure. Whereas

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3 In some countries (for example, Moldova), the national selection process is already sufficiently transparent. However, the requirement to post the recording of the interviews with the candidates on the website of the Ministry of Justice is, in my view, excessive. See, PACE, ‘Election of Judges to the European Court of Human Rights: List and Curricula Vitae of Candidates Submitted by the Government of the Republic of Moldova’ (23 August 2021) Doc 15350.

4 When it came to the succession of Angelika Nußberger, outstanding candidates were excluded from the national selection process. Even though it is clear that in the end only three persons can be selected from a larger group of candidates, this selection must be minimally comprehensible. See, P Mahoney in this Issue.

5 D Kosař, ‘Selecting Strasbourg Judges: A Critique’, in Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts, M Bobek (ed), (Oxford University Press 2015). However, some information is available about the procedure before the Committee on the Election of Judges, which is mandated by the Plenary Assembly to interview candidates, scrutinise their curricula vitae, and make specific recommendations to the PACE concerning their qualifications. For instance, the procedure for interviewing the candidates by the Committee is standardised (see, PACE, ‘Procedure for the Election of Judges to the European Court of Human Rights: Memorandum Prepared by the Secretary General of the Assembly’ (25 January 2023) SG-AS (2023) 01rev02). Apart from that, it is PACE’s policy to elect a member from the underrepresented sex where the available candidates are equally qualified (see, PACE, ‘Candidates for the European Court
states have formalised this procedure within the guidelines of the Committee of Ministers, there remains a wide range of variation between states with regard to the conduct of this process. In relation to the formal requirements imposed by states, they may be classed as a ‘push’ or a ‘pull factor’, preventing or encouraging candidates to apply. For example, difficulties in accessing to the Council of Europe’s on-site day-care for young children and in enrolling children in the international schools in Strasbourg might be a push factor for a candidate with young children in the family. However, if the candidates’ children are out of school age, childcare and schooling does not play a role. Whenever a person decides to apply for the position of Judge at the ECtHR, this is mainly motivated by the larger degree of influence exerted by ‘pull’ as compared to ‘push’ factors. What a candidate actually regards as a ‘push’ or a ‘pull’ factor, and at what point the latter triggers them to apply, depends on the personal circumstances of the candidate. Nevertheless, it can be generally said that if the total number of push factors is too great, good candidates may refrain from applying. Taking this into consideration, I would, for instance, advise against recording the interviews with candidate Judges. Similarly, I would regard the requirement to take a language test for individuals who are around the age of 50 to be a weighty push factor. Therefore, it is not something I would recommend either.


In its Resolution on Judicial Ethics, the Court specified that Judges shall ‘refrain from expressing themselves, in whatever form and medium, in a manner which may undermine the authority and reputation of the Court or give rise to reasonable doubt as to their independence or impartiality. This applies equally to the exercise of judicial function, representation of the Court, and to academic or other public or private activities outside of the Court. They shall proceed with the utmost care if using social media’ (see, ECtHR, ‘Resolution on Judicial Ethics’ (21 June 2021): <https://www.echr.coe.int/documents/d/echr/Resolution_Judicial_Ethics_ENG>.)
that Judge’s public opinions or even personal experiences may raise legitimate doubts about their ability to decide impartially in a particular dispute is not new in the history of international adjudication.9 Usually, in this type of situation, a case-by-case determination of a conflict of interest is preferable to imposing proscriptions on specific extra-judicial activities, as the latter would have the undesirable effect of insulating international adjudicators from outside life.10

At the same time, as highlighted by responses to the former ECtHR President’s official visit to a country in the grip of an increasingly autocratic regime,11 the integrity of the ECtHR as an institution may be irrevocably damaged by certain types of actions by Judges. This concern could be addressed by providing training to Judges before they start their mandate and during it, in order to raise their awareness of factors that could contribute to their impartiality being called into question. Judges’ posts on social media, contacts with the traditional media, and contacts with officials that are in wider contact with the government are some examples of such factors. To this end, I propose to develop a code of good practice for ECtHR Judges, which would in particular ensure that their conduct is above reproach on occasions when they get in touch with journalists or interact with political institutions. This proposal is in line with ‘The Burgh House Principles on the Independence of the International Judiciary.’12

Aside from external factors, Judges’ role and participation in internal mechanisms (e.g. the working conditions at or the self-government of the Court) may also produce an undesirable influence on their independence and

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11 Specifically, the commentators noted that in the course of one trip Judge Spano engaged with institutions and politicians who are deeply implicated in cases that are or will come before the ECtHR under his Presidency, and also personally received an honorary doctorate from a university that has dismissed academics whose cases are pending before the ECtHR, for instance (see, D Kurban, ‘Why Robert Spano Should Resign as President of the ECtHR’ (VerfBlog, 9 September 2020); H Kaplankaya: ‘European Court President Spano’s Visit to Turkey and Its Repercussions’ (Strasbourg Observers, 28 September 2020)).
impartiality. I will expand on this with reference to the process of the election of the President of the Court. This election, within the framework of the European Convention on Human Rights (ECHR), is essentially organised by the Court itself. Although this competence seemingly strengthens the autonomy of the Court, it creates a risk for the Court to be unduly absorbed by the electoral process. Candidates for the Presidency will have to consider their constituency long before the election, which may directly or indirectly influence them to adjust their judicial decision-making.

One must therefore consider whether it would make sense to exonerate the Court from this election. What follows may sound like a heretical idea (especially coming from a former Judge of the ECtHR), but this proposal is meant to stimulate discussion for the strengthening of the institution. The merits of the idea that the President of the Court be appointed by the Secretary General of the Council of Europe on a joint recommendation from the acting President of the Court and the Chairperson of the Committee on the Election of Judges to the ECtHR, on the basis of a list of objective criteria, are worth exploring. By way of example of the German Federal Constitutional Court, there might be good reasons to entrust another body with the appointment of the President. Having experience of the Court’s administration and close co-operation with fellow Judges, the acting President of the Court would be in a good position to nominate their successor. Similarly, in view of their involvement in the selection of Judges, the Chairperson would be able to appraise the qualifications of the Judges and decide on the best candidate for the position of President.

In my view, the criteria to be used for evaluating the candidates should include:

- fluency in French and English. This is essential, given that the President is automatically part of Grand Chamber formations;
- excellent leadership skills, as the President is one of the most powerful actors in terms of formal authority over the Registrar and the staff of the Court;

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13 Article 25 ECHR; ECtHR, Rules of the Court (2023) Rule 8.
14 The Bundestag and the Bundesrat alternately elects the President and Vice-President of the Federal Constitutional Court. Those elected are appointed by the President of Germany (see, Bundesverfassungsgerichtsgesetz in der Fassung der Bekanntmachung vom 11. August 1993 (BGBl I S 1473), which was last amended by Article 4 of the Act of 20 November 2019 (BGBl I S 1724), paras 9(1), 10).
15 Article 26(5) ECHR.
16 The President of the Court has powers to decide on third-party interventions, to appoint Single Judges, etc. (Article 36 ECHR; ECtHR (n 13) Rule 27(2)).
– a solid record of work done by the Judge at the Court;
– accomplishing additional responsibilities relating to Court administration, considering that the President of the Court engages in judicial diplomacy on behalf of the Court;¹⁷
– trust in the person of the candidate, in the sense that this person must be able to put the interests of the Court before their own interests.¹⁸

Furthermore, in certain countries of the Council of Europe, it seems to me that it is common for the government to communicate with the national judges in sensitive and high-profile cases and dictate a desired outcome to them. States also have a strong interest in retaining influence over international decision-making where Judges determine issues affecting state interests.¹⁹ In my opinion, Judges who experienced such situations at the ECtHR receive little support from the Court. As long as we have states where the judiciary is not always independent, we will also have Judges at the Court who are sometimes in a precarious situation.

In this context, developing measures for ensuring the independent functioning of the Court and its judges is a challenging endeavour. Yet, internally, a few precautions are already in place for situations where Judges could experience external pressure in the performance of their judicial duties. If there is a sensitive case and one assumes pressure on the national Judge, they will not be a Rapporteur for this case. However, more can be done to remedy this situation: the Court must offer the Judges strategies for freeing themselves, on the one hand, from the influence of national opinion leaders, and for ensuring the integrity of the Court as a whole, on the other.²⁰

¹⁸ For instance, the Judges’ dissents could serve as an indicator of their loyalty to the Court. The Judge may misuse dissents as a forum to demonstrate their academic skills by writing extensively when it is unnecessary.
²⁰ The wise use of separate opinions can play a valuable role in reducing negative consequences for the independence and integrity of the ECtHR. I suggest that the Judges’ code of ethics should include a provision that deals with separate opinions, and Judges should be trained in that matter. First, the Judges are not required to add a separate opinion in every case they were not able to join the majority (pursuant to Article 45(2) ECHR and ECtHR (n 13) Rule 74(2) and Rule 88, to deliver a separate opinion is a right of a Judge, not their duty). The Judges should keep in mind that it is not always necessary to provide reasons to the dissent. A bare statement of dissent is also possible (ECtHR (n
3  Life After the Mandate

The Institute of International Law, addressing the question of the position of the international judge, noted that in order to strengthen the independence of judges, ‘it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years, and that such terms of office should not be renewable.’\(^{21}\) In view of this, a nine-year non-renewable term of office for Judges of the ECtHR contributes positively towards a high level of judicial independence.\(^{22}\) At the same time, this long term of office creates another potential conflict for Judges who, depending on their age at appointment, may need to re-integrate into the national judicial system at the end of their term.\(^{23}\)

Going back to one’s country of origin after the end of the judicial mandate is often not easy. These difficulties are greatest when there exists a potential conflict between the Court’s jurisprudence and the human rights situation in a country. It is likely in such scenarios that people at home are disappointed with the Judge from their country. The Judge’s hands may be tied by threats of future retaliation or the prospect that neither the government nor the national courts will be sympathetic to the idea of giving them an attractive position after the end of their mandate. It goes without saying that state agencies have abundant means to make a person’s return extremely difficult. As long as there are states where the observance of the rule of law is in a perilous state, Judges cannot be protected against such attacks.

Those holding the position of ECtHR Judge will not fail to notice the impossibility of renewing their finite mandate. They are also aware that it is not easy to re-enter a professional environment after a nine-year gap.\(^{24}\) Judges with excellent professional qualifications will most probably find good job opportunities after the end of their mandate; the most difficult problem is with Judges who are less qualified, whose position prior to the mandate was not

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13) Article 74(2)). Second, the Judges’ code of ethics should set out which lines should not be crossed in a separate opinion, but without impinging upon the independence of the individual Judge or harming the institution. This proposal is in line with the recommendations of the European Commission for Democracy Through Law (see, Venice Commission, ‘Report on Separate Opinions of Constitutional Courts’ (17 December 2018) Opinion No. 932/1018, paras 42, 45, and 61).

21  Institut de Droit International, ‘The Position of the International Judge’ (9 September 2011) 6 RES EN FINAL, Article 2(1).

22  Dunoff and Pollack (n 1) 253.


24  This problem would exacerbated even further if the mandate were to be extended to 12 years.
very secure, and who did not make a special name for themselves as Judge at the ECtHR. For them, it is not easy to obtain a comparable position after the end of their mandate.

Finally, in any competitive environment, the saying: those who are absent, are always wrong (‘les absents ont toujours tort’) holds true. Candidates who apply for a position at a supreme court in the national context have an advantage because they are at home. It is important to understand that whoever leaves their home country is not treated as favourably after nine years relative to someone who remained at home. On the contrary, many who have stayed at home regard the ECtHR Judge from their state as someone who no longer belongs to the inner circle of valid candidates for a prestigious position, at the apex court, for instance. At the same time, I would not support a proposal for former ECtHR Judges to automatically be given a position in their highest national court. Two reasons speak against allowing this kind of automatic route: first, the authority to appoint judges must be left to the states, and second, the background of judges is far too heterogenous for such a mechanism.

4 Concluding Remarks

To conclude, the longer I work as a judge, the more I realise how difficult it is to guarantee and secure judicial independence and impartiality. On the one hand, the diverse professional and cultural background of the ECtHR Judges is an important asset for bringing different perspectives on complex human rights issues. On the other hand, it is simultaneously a potential challenge to judicial independence, as the Judges’ understanding of this value is quite often not the same. However, these intrinsic differences are not insurmountable, and should not discourage us from enhancing judicial independence to the highest possible extent.

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