Articles

Judicial Self Government and the Sui Generis Case of the European Court of Human Rights

By Başak Çali[*] *& Stewart Cunningham*[**]

Abstract

In this article we explore the operation of judicial self-government (JSG) at the European Court of Human Rights (ECtHR), paying particular attention to how JSG operates in the judicial selection procedures and in the administration of the court. We find that JSG at Strasbourg is highly variable with relatively weak levels of judicial influence on the selection of judges contrasted with a high degree of control over court administration. We go on to analyze how the dual nature of JSG at the ECtHR (strong post-election and weaker pre-election) promotes or hinders a range of values, namely, independence, accountability, transparency and legitimacy. We argue that the JSG practices at the ECtHR prioritize judicial independence at the expense of accountability. The picture with regard to transparency is mixed and while judicial decision making itself is fully transparent, wider JSG practices at Strasbourg are largely non-transparent. We note that legitimacy concerns were a key motivating factor in many of the key JSG reforms undertaken by the ECtHR in recent years and explore whether these have had the desired impact. We conclude by arguing that the differences in reach and form of JSG at the pre and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle.

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A. Introduction

The European Court of Human Rights (ECtHR) presents a sui generis case to study the forms, evolution and impacts, perceived and measurable, of practices of judicial self-government (JGS) at the supranational level. The reach and scope of JSG at Strasbourg is highly variable, depending on what aspects of the Court's life one studies. JSG at the point of judicial selection is at best 'embryonic'[1] since the introduction of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (Advisory Panel), as the process continues to favor the primacy of the Parliamentary Assembly of the Council of Europe (PACE). Once elected, however, sitting judges enjoy unbounded powers of JSG with respect to the management of the Court's judicial activities, without much, if any, interference from a superior body. In particular, the President of the Court as well as Section Presidents, alongside the Jurisconsult and the Registry, exercise JSG in managing the Court's work and giving it jurisprudential direction.

In what follows we first provide an overview of the forms of JSG at the ECtHR pre and post-election. After setting out how JSG operates at Strasbourg we go on to analyze how its dual nature (strong post-election and weaker pre-election) promotes or hinders a range of values, paying particular attention to independence, accountability, transparency and legitimacy. Finally, we turn to how JSG at the ECtHR has impacted on the separation of powers at the Council of Europe and on understandings of the democratic principle.

The central argument of this article is twofold. First, in terms of values, we suggest that the current JSG practices at the ECtHR are better at promoting legitimacy and judicial independence but far weaker on transparency and accountability. The strength of post-election JSG, for example, contributes significantly to the very high levels of judicial independence enjoyed by judges at the ECtHR. It is the recent reforms to judicial selection, however, that appear to have most affected legitimacy, with improving legitimacy one of the key motivations behind these reforms. The picture with regard to transparency is mixed and while judicial decision making itself is fully transparent at Strasbourg, wider JSG practices, both at the point of judicial selection and in terms of court administration are largely non-transparent. Accountability is limited at the ECtHR, perhaps in a direct trade-off with the promotion of other values, like independence where the high levels of post-election JSG guarantee independence but consequently reduce the levels of judicial accountability.[2]

[1] Alberto Alemanno, *How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 204.

[2] Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 225–276 (2017).

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Our second core argument is that the differences in reach and form of JSG at the pre and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle. The democratic principle is assured in judicial selection because democratically elected lawmakers are ultimately responsible for the selection of judges with limited advisory input provided by the judiciary. Post-election, judges are able to act independently in office without the risk of undue political influence, ensuring respect for the separation of powers. Caution must be exercised, however, to ensure that any subsequent reforms to JSG practices at the Court continue to strike this very fine balance.

B. Forms of JSG at the European Court of Human Rights

We begin by setting out how JSG operates at the ECtHR, exploring its dual nature, with relatively constrained JSG in judicial selection procedures, combined with strong post-election control over court administration.

I. Election of Judges

The criteria and procedure for the election of judges is set down in Articles 21[3] and 22[4] of the European Convention on Human Rights and Fundamental Freedoms (ECHR) but the Convention provides very basic criteria and a simple political procedure for the appointment of judges. Not only do these Convention articles not hint at any form of JSG, the overall procedure has been described as "excessively vague."[5] Given the lack of significant detail in the Convention itself and in response to sustained criticism by a range of stakeholders concerning the quality of judges selected by PACE,[6] the Council of Europe institutions have implemented a number of reforms with respect to the procedure for appointing its judges. Prior to these reforms the procedure for electing judges to the ECtHR was a three stage political process involving the submission of a list of three candidates by the national governments, scrutiny of this list by an ad-hoc sub-committee of PACE and then a full vote by PACE (see Figure 1).[7] The scrutiny process conducted by the ad hoc sub-

[3] Article 21 sets out the criteria for office, which are short and succinct – 'The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'.

[4] Article 22, which states that 'The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party'.

[5] Koen Lemmens, *(S)electing Judges for Strasbourg A (Dis)appointing Process?, in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 98.

[6] *See*, e.g., Juta Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (2003), http://www.corteidh.or.cr/tablas/32795.pdf.

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committee included the opportunity to conduct interviews before making recommendations to PACE on the candidates' suitability. PACE introduced several reforms to the process, beginning around 1996, including the introduction of standard CV formats,[8] recommendations for how the national selection procedure should be conducted[9] and requirements for gender balance in the list of nominated candidates.[10]

The two most significant changes to the selection process, that hinted at a move away from exclusive control of judicial selection by political processes at PACE, took place in 2010 and 2015. The first was the creation of the Advisory Panel of Experts by the Committee of Ministers, the executive arm of the Council of Europe, to assist PACE in the selection of the most qualified candidates. Resolution 2010 (26) establishing the Advisory Panel,[11] notes that the Panel's mandate is to "advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria" set out in both the Convention and in Guidelines issued by the Committee of Ministers with respect to the selection of judges.[12] While much of the election procedure for judges remains the same, the creation of the Advisory Panel introduces an expert pre-screening layer into the procedure, prior to the assessment of the candidates by PACE (see Figure 1). The second significant change was the creation, in 2015, of a permanent Committee on the Election of Judges to the European Court of Human Rights within PACE to replace the ad hoc sub-committee that previously scrutinized the lists and interviewed candidates.[13] We address the rationale and the JSG consequences of each of these reforms below.

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[7] *See* Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights, Information document prepared by the Secretariat, 22 November 2017, http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e.

[8] Resolution 1082 (1996), Procedure for examining candidatures for the election of judges to the European Court of Human Rights, Parliamentary Assembly of the Council of Europe (1996), http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNjQ5MyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE2NDkz.

[9] Parliamentary Assembly of the Council of Europe, Recommendation 1429 (1999), National procedures for nominating candidates for election to the European Court of Human Rights, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16755&lang=en.

[10] Parliamentary Assembly of the Council of Europe, Recommendation 1649 (2004), Candidates for the European Court of Human Rights, available at http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17193&lang=en.

[11] Committee of Ministers, Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (2010), http://vm.ee/sites/default/files/content-editors/Res_2010_26_eng.pdf.

[12] *Id.*

[13] *See* Committee on the Election of Judges to the European Court of Human Rights, http://www.assembly.coe.int/nw/xml/AssemblyList/AL-XML2HTML-EN.asp?lang=en&XmlID=Committee-Cdh.

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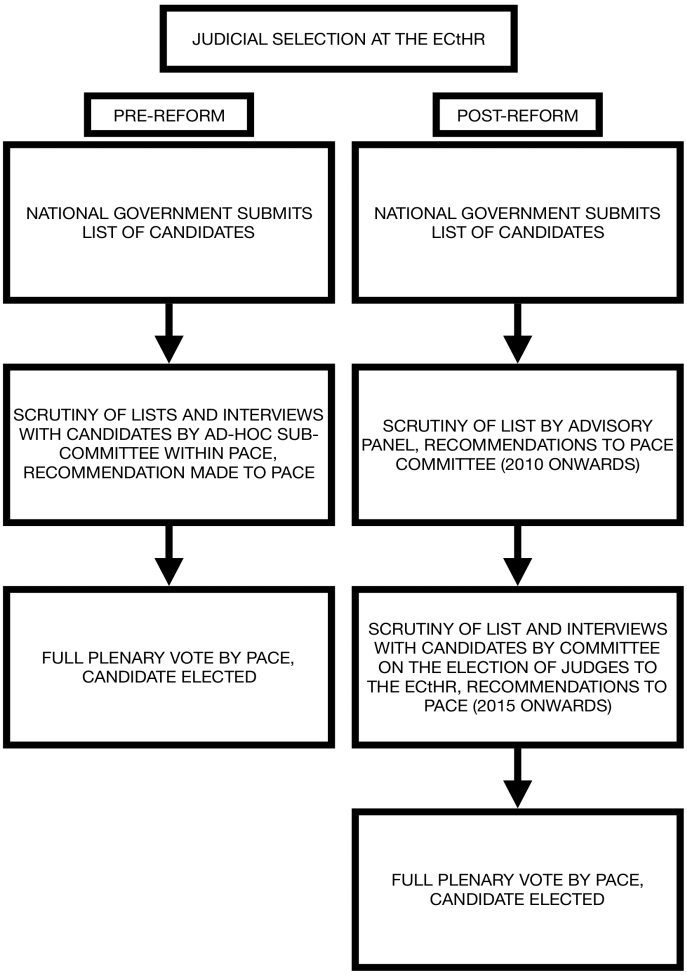
Figure 1



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1. Advisory Panel

1.1 The rationale

The most significant change, in terms of introducing JSG into the selection of judges, has been the introduction of the Advisory Panel in 2010. The rationale for establishing the Advisory Panel was primarily about ensuring "the quality of the candidates"[14] for election as judges to the Court. The poor quality of judges has sparked public debates in some member states of the Council of Europe as well as amongst domestic apex court judges, in particular in the United Kingdom in the 2000s.[15] In 2003 a report by the NGO Interrights[16] underlined that the Court's authority risked "being undermined by the *ad hoc* and often politicized processes" that were used at that time to appoint its judges.[17] The Court's appointment process was criticized for lacking transparency and accountability, at the national and international level.[18] The Interrights group made a number of recommendations including that the "body making recommendations to the Parliamentary Assembly on the eligibility or suitability of candidates should itself be independent, possess the requisite expertise to fulfil its role, and follow a fair and open procedure."[19]

The Group of Wise Persons, set up in 2005 to examine the long-term efficiency of the control mechanism of the ECHR, took up the idea of an Advisory Panel, in their 2006 Report, as a way of addressing the risk of the ECtHR being "undermined due to the not-always-satisfactory quality of judges."[20] The crucial intervention that officially kick-started the process, however, was a letter from the then President of the Court, Jean-Paul Costa, to the ambassadors of all the Council of Europe States, sent in the lead up to the 2010 Interlaken Declaration.[21] Costa based his call for an Advisory Panel on ensuring that the Strasbourg Court was able to command the respect not only of national judiciaries but also the Court of Justice of the European Union (CJEU) judges, in light of the prospect of the

[14] Advisory Panel (2013)12EN, Final activity report for the attention of the Committee of Ministers, 11 December 2013, at para. 2. Available at https://dm.coe.int/CED20140017598.

[15] Başak Çalı et al., *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 Human Rights Quarterly 955–984 (2013).

[16] *Supra* note 6.

[17] *Id*. at 3.

[18] *Id.*

[19] *Id.* at 34.

[20] Bilyana Petkova, *Spillovers in Selecting Europe's Judges Will the Criterion of Gender Equality Make it to Luxembourg?*, *in,* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 230.

[21] *Id.* at 230.

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EU's accession to the Convention. He wrote that "one of the critical issues in this context will be the future relationship between the Court of Justice of the European Union and the Strasbourg Court. For that relationship to function it must be based on mutual respect."[22] These views were endorsed at the highest political level by the Interlaken Declaration of 19 February 2010, which called on the High Contracting Parties to ensure "full satisfaction of the Convention's criteria for office as a judge of the Court."[23]

The main rationale for the introduction of the Panel, therefore, has been to ensure improved quality control in the election procedure and to tame what has been perceived as an unhealthy politicized election procedure at PACE by injecting expert scrutiny into the election process. Having those with judicial experience themselves more closely involved in this quality control process was seen as a key way of ensuring that the most qualified people were elected to the office. Before examining whether these expectations have been met we will first explain exactly how the Panel functions.

1.2 The Panel's functioning

Prior to the introduction of the Advisory Panel the election of judges was entirely a political process at the domestic, as well as at the European level, with national governments, domestically,[24] and the PACE Parliamentarians (nominated to office by domestic parliaments), supranationally, being the primary decision makers in the process. Since 2010, national governments, before submitting the list of candidates to PACE, are required to send the names and CVs of its candidates to the Advisory Panel. The Panel performs its functions based solely on the CV and any other written documents submitted by governments. If they find that all candidates are suitable and meet the criteria, then they inform the national government. If they find any of the candidates not suitable then they communicate this to the national government which is then invited to offer additional information or new candidates. The Panel provides its views on the candidates to PACE in writing and all of the communications from the Advisory Panel (to the State and to PACE) are kept confidential.

[22] *Id. See* Letter from Mr. Jean-Paul Costa, President of the European Court of Human Rights, addressed to member states' Permanent Representatives (Ambassadors), 9 June 2010, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12764&lang=en.

[23] High Level Conference on the Future of the European Court of Human Rights*, Interlaken Declaration,* 19. February 2010 at para. 8. Available at http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf.

[24] Although it is worth noting that the process for selecting candidates at the national level varies from country to country with varying degrees of input from judicial peers in the selection process.

The Advisory Panel is composed of seven experts and it must have geographical and gender balance.[25] The Advisory Panel's current Chairperson is a former judge of the Court from Croatia, Nina Vajić and another former ECtHR judge, Paul Mahoney (UK), is also a current member. The remainder of the members are composed of former, and currently serving, judges in apex domestic courts, some of whom also have professorial positions in universities.[26] The composition of the Panel has changed over time in terms of representation of ECtHR judges. In 2010, when the Panel was established, there were three former ECtHR judges as members.[27] This has now reduced to two former ECtHR judges, as noted above. There are no formal targets with regard to the composition of the panel (i.e. the number of ECtHR judges versus national judges or jurisconsults) other than the criteria for geographical and gender balance. There exists, however, a tacit practice in favor of a balanced representation from former Strasbourg judges and national judiciaries.

The members of the Panel are appointed by the Committee of Ministers following consultation with the President of the Court but this consultation is a confidential process and there is no further information available on the appointment process.[28] There is no open public call for members of the Panel and it is unclear how potential names reach the Committee of Ministers although it could be assumed that the Court President takes an active role in identifying suitable members. Alemmano, discussing the influence that the Court's President has on the composition of the Panel notes that it (and the equivalent Panel at the CJEU) "are becoming progressively more expressions of the judiciary than the executive", which "may give rise to some embryonic form of unintended judicial self government."[29]

1.3 Has the Panel altered the political process of judicial selection in practice?

While Advisory Panel recommendations to governments and to PACE are confidential, the Panel issues regular activity reports, which highlight the fact that they rarely accept the initial list of candidates submitted by national governments without at least making additional enquiries. In the Panel's third activity report, published on 30 June 2017, it is noted that they examined 12 lists of candidates in the period 1 January 2016 to 30 June

[25] *Supra* note 11, at para. 2.

[26] Presently, the other members are Lene Pagter Kristensen, Supreme Court (Denmark); Maria Gintowt-Jankowicz, Constitutional Tribunal (Poland); Bernard Stirn, Conseil d'Etat (France) and Associate Professor at Sciences Po, Christoph Grabenwarer, Constitutional Court (Austria) and Professor of Law at the Vienna University of Economic and Business; and Maarten Feteris, Supreme Council (The Netherlands) and Professor of Tax Law at the Erasmus University, Rotterdam.

[27] They were Ms. Renate Jaeger (Germany), Mr. Matti Pellonpää (Finland) and Mr. Luzius Wildhaber (Switzerland).

[28] *Supra* note 11, at para. 3.

[29] *Supra* note 1, at 204.

2017 and concluded that in respect of only two lists were all the candidates suitably qualified.[30] For the remaining ten lists the Panel sought additional information and it notes that "requests for additional information have become the rule rather than the exception."[31]

A central concern of the Panel is the lack of due weight given to its recommendations by national governments. In the early days of the Panel there were examples of states effectively bypassing the Panel altogether by submitting their nominations to the Panel simultaneously as they submitted them to PACE.[32] Mr. Luzius Wildhaber, former judge of the Court, and a former Chairman of the Panel, speaking in 2013, expressed concerns of his own in relation to the functioning of the Panel when he said "my fellow colleagues and I have the impression that, as things stand at the moment, the Panel's opinion is too often either being disregarded or not considered important enough or necessary by some stakeholders in the election procedure."[33] The same complaint was made by another former Chairperson, John Murray, in remarks made at the 1233th meeting of the Ministers' Deputies on 8 July 2015 when he said "the Panel has been deeply concerned that in a number of cases…its opinions seem to have been disregarded…[and] some states appear to have deliberately set out to bring their lists to the Parliamentary Assembly no matter what the Panel says."[34]

The Panel's second activity report published in February 2016 explains that no lists of candidates were transmitted to PACE without first being sent to the Panel in 2014-15 suggesting that this problem may have been addressed.[35] The Panel notes in its third activity report, in 2017, that in three cases candidates were maintained on national government lists submitted to PACE "despite the Panel's negative views on one or more of the candidates."[36] This observation that some national governments submitted lists to

[30] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Third activity report for the attention of the Committee of Ministers*, 30 June 2017 at para. 50. Available at https://rm.coe.int/en-3rd-activity-report/168074f0ad.

[31] *Id.* at para. 51.

[32] Lemmens *supra* note 5, at 106.

[33] Steering Committee for Human Rights, *Ministers' Deputies Exchange of Views with Mr. Luzius Wildhaber, Chairman of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights,* DH-GDR (2013) 005, 5 February 2013, as quoted in Lemmens *supra* note 5, at 106.

[34] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Second activity report for the attention of the Committee of Ministers*, 25 February 2016, at 18. Available at https://rm.coe.int/168066db65.

[35] *Id.* at para. 49.

[36] *Supra* note 30, at para. 53.

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PACE despite negative opinions on certain candidates' suitability by the Panel are demonstrative of continuing concerns with respect to the Panel's effectiveness and provide an example of how it has failed to meet expectations with regard to injecting judicial considerations into the deeply political process of electing judges. Despite this lack of respect for the Panel's recommendations, the Council of Europe's Steering Committee for Human Rights (CDDH), in its 2017 report, refused proposals to make the Panel's recommendations binding on member states and highlighted the expert and the advisory role of the panel.[37] This is reflected in the recent Copenhagen Declaration where the importance of cooperation with the Panel is stressed, however, States Parties are only encouraged to "give appropriate weight" to negative views from the Panel.[38]

Despite the fact that their decisions are not binding, the Panel appears to be of the opinion that its work is having a positive impact on the quality of candidates being proposed by national governments. It notes that, since it was created, it has examined 46 lists of candidates and "based on this unique experience, the Panel is satisfied in broad terms, that the quality of candidates that have come forward has improved, as least in part, because of the existence of the Panel."[39] The activity reports of the Advisory Panel certainly point to an emergence of standardized expectations with regard to the skills and experience of judge candidates with the Panel providing detailed accounts of what they look for in terms of candidates' prior work experience.[40] The Panel, while respecting that its advice is not legally binding, nevertheless urges PACE to follow its advice and not to accept lists of candidates that include individuals that the Panel believe to be unsuitable.[41] Given the rise in the rejection of the lists of candidates by the PACE Committee in recent years based on the inadequacy of the CVs of candidates submitted,[42] it may be speculated that the analysis carried out by the Advisory Panel has had important consequences for these rejections.

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[37] Steering Committee for Human Rights, Committee of Experts on the System of the European Convention on Human Rights, *Report on the process of selection and election of judges of the European Court of Human Rights*, DH-SYSC(2017) R4 Addendum, 10 November 2017 at para. 84. Available at https://rm.coe.int/-draft-report-on-the-process-of-selection-and-election-of-judges-of-th/1680767b5a.

[38] The Copenhagen Declaration on the reform of the European Convention on Human Rights system, 12–13 April 2018, available at https://www.coe.int/bs/web/portal/-/copenhagen-declaration-adopt-1, at para. 61.

[39] *Supra* note 30, at para. 58.

[40] *See* activity reports of the Panel, *supra* notes 30 and 34.

[41] *See* John Murray's comments to 1233th meeting of Ministers' Deputies on 8 July 2015, *supra* note 34, at p.18.

[42] In the last year alone, the PACE Committee rejected the full list of candidates from Albania, Georgia and Turkey two times in a row. *See Election of Judges to the European Court of Human Rights – tables of progress by Contracting Party,* http://website-pace.net/documents/1653355/1653736/TableForthcomingJudgesElections-EN.pdf/775de55c-67b8-4f46-befd-1063dca1b5e0.

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2. The PACE Committee on the Election of Judges to the European Court of Human Rights

The concerns about the unhealthy political nature of the judicial selection process in the last decade also led to the creation of the PACE Committee on the Election of Judges to the European Court of Human Rights in January 2015.[43] This Committee, composed of twenty parliamentarians, is responsible for reviewing the Panel's views, most crucially, interviewing candidates in person, and conducting its own scrutiny of candidates' experience and qualifications before making its recommendations on suitability to the PACE Plenary. Prior to the reforms, this function was performed by an *ad-hoc* Sub-Committee within PACE, which was formed without any expectation that the members had legal knowledge relevant to the ECtHR. The Sub-Committee was explicitly criticized for not having the relevant knowledge and experience to assess the candidate's knowledge of human rights law as it was made up of parliamentarians and not legal experts.[44] The reforms to the PACE committee addresses these concerns.

First, the Committee was upgraded from being an *ad-hoc* Sub-Committee to a standing Committee. Second, the members of this Committee are now expected to have some kind of legal experience.[45] The upgrading of the *ad-hoc* Sub-Committee to a full Committee was a significant move as it increased the legitimacy and 'soft power' of the Committee and also raised its visibility within PACE and the Council of Europe more generally. It is also expected that the legal knowledge of its members would allow for a more rigorous interview process. Criticisms have been made, however, of the decision to have a smaller and legally specialized Committee because of the difficulty in achieving "an equitable geographical distribution" and the CDDH, in its 2017 review, suggests that the composition of the Committee should be re-examined because the limited number of Committee members and lack of geographical diversity may impact on the "democratic legitimacy of the process."[46] In the same review, the CCDH rejected proposals for the Advisory Panel to interview candidates prior to the interviews by the PACE Committee. It did, however, respond favorably to the suggestion that Panel members be physically present at the Committee meetings so that they can better explain their views to the Committee members.[47] If these reforms are taken up, the JSG element in the selection of judges would be strengthened further, again in the form of soft power. Whether the PACE Committee

[43] *Supra* note 37, at para. 103. *See* Parliamentary Assembly Council of Europe, Resolution 2002 (2014), *Evaluation of the implementation of the reform of the Parliamentary Assembly*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21049&lang=en.

[44] *Supra* note 6, at 25–26.

[45] *Supra* note 37, at para. 104. *See* also Andrew Drzemczewski, *The Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights,* 35 Human Rights Law Journal, 269–274 (2015).

[46] *Supra* note 37, at para. 120.

[47] *Id*. at paras 94–97.

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recommends the three candidates to the PACE Plenary and which one of these is ultimately elected, however, remain political decisions.

II. Court Administration

While JSG in the judicial selection process is constrained, once elected the judges of the ECtHR have strong formal powers with regard to the day to day functioning of the Court. The Rules of Court are created, adopted and amended by the Court itself. The judges are also responsible for the election of their peers to official, and powerful, offices within the Court. The election of judges to the positions of President and Vice-President of both the Courts and the Sections is undertaken by the full plenary Court by way of secret ballot.[48] The President's powers and functions are expressed very broadly in the Rules of the Court as being to "direct the work and administration of the Court."[49] The President has assistance in this regard from the Bureau, which is made up of the President of the Court, the Vice-Presidents of the Court and the Section Presidents. The Bureau assists the President in his or her function of directing the work of the Court and the President can submit to the Bureau "any administrative or extra-judicial matter which falls within his or her competence."[50]

The judges acting as a plenary Court are also responsible for the election of the Court's Registrars and Deputy Registrars.[51] One of these Registrars acts as the Jurisconsult whose job is to monitor the quality and consistency of the Court's jurisprudence with a team of registry lawyers.[52] Registry lawyers, working for the Juriconsult, review the draft judgments and decisions of the Court, paying "particular attention to drafts that apply the case law to new situations, or propose to develop the case law in a particular direction" and then report on this to the Jurisconsult.[53] Based on these reports the Jurisconsult's office writes a case law update to all the Judges and Registrars, including warning "against discrepancies or omissions of jurisprudence."[54] When the Jurisconsult "considers that there is a potential

[48] European Court of Human Rights, *Rules of Court*, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf at Rule 8.

[49] *Id.* at Rule 9.

[50] *Id.* at Rule 9A.

[51] *Id.* at Rules 15 and 16.

[52] *Id.* at Rule 18B. *See* also Vincent Berger, *Jurisconsult of the Court (2006 – 2013),* http://www.berger-avocat.eu/en/echr/jurisconsult.html

[53] John Paul Costa, Speech at Zagreb University, 30 March 2009, https://www.usud.hr/sites/default/files/dokumenti/President_Costas_Speech_given_at_the_Zagreb_Faculty_of_Law_on_30_May_2009.pdf at p.3.

[54] Berger, *supra* note 52.

conflict or divergence on the cards" this will be communicated to the relevant Section(s).[55] As well as assisting the President, the Bureau also facilitates communication between the different Sections of the Court, which "provides an evident opportunity to identify and possibly correct potential conflicts,"[56] presumably with reference to the Jurisconsult's analysis.

In terms of court administration, therefore, the most powerful actors are the President and the Section Presidents. The President's power lies in their formal authority to wield power over the Registrar and the staff of the Court, their powers to decide on the third party interventions that may be allowed, and their power to appoint Single Judges under Rule 27A of the Rules of Court.[57] The President alongside the Vice-Presidents, the Section Presidents and the national judge are also automatically part of Grand Chamber formations, together with other judges selected by the drawing of lots. Alongside these formal powers the President has informal influence as a power broker between the different Sections of the Court with regard to referrals of cases to the Grand Chamber and as a "judicial diplomat" concerning the choice of cases to be identified as pilot judgments. The power of the President in an informal sense undoubtedly depends on the style of leadership of the President and the extent to which they delegate to the Registrar with regard to everyday judicial policy decisions. Section Presidents, too, are powerful actors. Once elected, Section Presidents are able to exercise important forms of judicial power in deciding the everyday management of cases in terms of prioritization. If the cases from the Sections are not brought before the Grand Chamber, the decisions of Sections are final and thus enable Sections to operate autonomously from one another. Alongside these, single judges are important actors in the ECtHR system due to the delegated powers they enjoy as part of single judge formations to dismiss manifestly unfounded cases.

The informal power of the Registry of the ECtHR as part of its JSG has been subject to much speculation. In anonymous and confidential interviews with past judges of the ECtHR, for example, some judges highlighted the informal power of the members of the Registry over the judicial processes.[58] Interviews with members of the Registry also underlined very strong forms of hierarchy within the Registry and that if informal power was exercised by the Registry, this would be vested with a few top ranking members rather than the Registry

[55] Costa, *supra* note 53, at 3.

[56] Erik Fribergh & Roderick Liddell, *The Interlaken Process and the Jurisconsult,* http://www.berger-avocat.eu/the_interlaken_process_and_jurisconsult.pdf, at 184.

[57] *See* List of Single Judges appointed by the President under Rule 27A of the Rules of Court, 1 February 2017, http://echr.coe.int/Documents/List_single_judges_BIL.pdf.

[58] Interviews conducted by the first author as part of her study on 'The Legitimacy and Authority of Supranational Human Rights Courts' (2008 – 2011). *See* https://ecthrproject.wordpress.com/research-output/.

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lawyers individually.[59] The informal power of the Registry is difficult to trace due to the confidential nature of the deliberations at the Court and the changing dynamics between the Presidents and the Registry over time. Although much remains unknown about the precise everyday ways in which JSG operates in the running of the Strasbourg Court there can be no doubt that the judges enjoy high levels of control over the administration of its judicial activities. Having set out how JSG operates at the ECtHR the following section analyses how these practices interact with a range of core values.

C. What values do JSG practices at the ECtHR promote or hinder?

It is argued that JSG, depending on its form, rationale and reach can have a diverse range of impacts on different values and our focus in this article is to explore the values of independence, transparency, accountability, and legitimacy.[60] Dunoff and Pollack, in their study of the institutional design of international courts, argue that they face a "judicial trilemma" and are only able to prioritize two out of the three values of independence, accountability and transparency.[61] According to their work, the design of the Strasbourg Court, as a whole, prioritizes independence and transparency at the expense of accountability.[62] For example, the high levels of judicial independence at the ECtHR, facilitated through strong post-election JSG and other features like the non-renewable term, necessarily results in a trade-off with regard to judicial accountability, as once elected, judges are subject to very limited control. If the levels of judicial accountability at the ECtHR were increased, for example, through the re-introduction of renewable terms or through stronger Executive oversight of judicial activities then this would limit independence as judges may then be subject to political influence. If the Court wanted to prioritize *both* accountability and independence then transparency may be affected, for example, through the use of *per curium* decisions where individual judges are not identified, as is current practice at the CJEU.[63]

In what follows, we hold that JSG practices and reforms at the ECtHR, do indeed boost the values of judicial independence at the expense of accountability but we hold that the position with regard to transparency is more complex than the picture painted by the "judicial trilemma". We also argue that JSG reforms at the Court promote the value of

[59] *Id.*

[60] These core values were selected by the JUDI-ARCH research team as being key to exploring the effects of JSG. *See* David Kosar's introduction to this Special Issue, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe'.

[61] *Supra* note 2.

[62] *Id*. at 249.

[63] *Id.* at 238.

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legitimacy and note that legitimacy concerns were one of the primary driving forces behind moves to increase levels of JSG at Strasbourg, particularly with regard to judicial selection.

I. JSG as a promoter of Judicial Independence

JSG, in particular post-election, strongly favors *de facto* and *de jure* independence of the Strasbourg judges. The introduction of the Advisory Panel, as discussed above, was a key reform to improve the quality of the short listed judges, but also to reduce the potential for political appointments to the Court, which are seen as a key threat to the Court's independence. There have, however, been several additional reforms at the Court that have attempted to improve the *de jure* independence of the ECtHR judiciary. The introduction of a single term of nine years for ECtHR judges, by way of Protocol No14 (May 2004),[64] was a crucial intervention in attempting to secure greater judicial independence by freeing the judges from re-election concerns. Prior to this change judges could be re-nominated by their national governments, which arguably created an incentive for them "to please their governments in order to secure their re-nomination."[65] This change eliminated that possibility although created another potential conflict for judges who, depending on their age at appointment, may now need to re-integrate into the national judicial system at the end of their term and so may remain at the mercy of their national governments for future career prospects in their national settings.

This new challenge, created by the introduction of the nine year term, was later addressed by way of Resolution 1914 (2013).[66] This resolution sought to "strengthen legal guarantees of independence of the Court's judges" by calling on State parties to do a number of things including giving judges and their families diplomatic immunity for life, providing judges with a similar judicial position in the national judiciary at the end of their Strasbourg term (if they are not at retirement age), including their term at the ECtHR in national employment records, and providing them with a suitable pension, equivalent to that of judges in the highest national courts, on retirement. These recommendations were designed to enhance independence by reducing the judge's reliance on the goodwill of their national government when their term on the court ends. As the Court itself said "there is a real risk that uncertainty regarding their professional and judicial prospects following the completion of their term of office at the Court will have negative

[64] Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, http://www.echr.coe.int/Documents/Library_CollectionP14_ETS194E_ENG.pdf.

[65] David Kosar, *Selecting Strasbourg Judges: A Critique*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 127 (Michal Bobek ed,, 2015).

[66] Parliamentary Assembly Council of Europe, Resolution 1914 (2013), *Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19396&lang=en.

repercussions for its perceived independence and for the attractiveness of the post of judge to possible candidates."[67] This highlights that whilst a single nine year term does address judges' strategic decision making with a view to re-election, it does not address the subsequent development of the career of the judges once they return back to their home countries. Thus, there is indeed a possibility that judges with post ECtHR job security concerns may act cautiously in order not to jeopardize their career development.

In terms of *de facto* judicial independence, the ECtHR judges enjoy substantial control and independence over the internal workings of the Court. The power of the Committee of Ministers to set the budget of the Court has important consequences for the hiring of lawyers and support staff and thus inadequate funding would hinder the effectiveness of JSG but the Committee of Ministers does not have any formal influence on court administration. The 2015 Committee of Ministers report on the Long Term Future of the European Court of Human Rights confirms that the Court must be supported and its authority not interfered with.[68]

JSG practices further allow for individual judges of the Court to enjoy high levels of internal independence on the Strasbourg bench. Each judge is able to reach their own decision in cases and can issue separate concurring or dissenting opinions without restriction in terms of content or length. The workings of the Jurisconsult and the Registry, in general, is rarely discussed or explored publicly, but formally judges are free to discard the recommendations made by the Jurisconsult in their deliberations. It could, however, also be argued that the introduction of the non-renewable term may have further empowered the Registry and the Jurisconsult as they are now the primary holders of longer term institutional memory. In a recent speech on the future of the ECtHR, currently serving Judge Albuquerque proposed that to improve judicial independence at Strasbourg that there should be a prohibition on judges moving to the Registry or Registry staff joining the bench for five years after their primary position ends, which is perhaps indicative of the informal power exercised by the Registry.[69]

In terms of the independence of the Court's judicial output Voeten concluded, in an empirical study of dissenting judgments at the ECtHR from 1960 to 2006, that while national judges tended to display some bias towards their national government in cases

[67] European Court of Human Rights, *Contribution from the Court regarding certain issues under consideration as part of the follow-up to the report of the CDDH on the longer-term future of the Convention system*, 23 February 2017 at para 30. Available at https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/168071442e.

[68] Steering Committee for Human Rights (CDDH), *CDDH Report* on *the long term future of the system of the European Court of Human Rights* (2015), available at https://rm.coe.int/1680654d5f.

[69] Alison Donald & Phillip Leach, '3 steps to save the European Court of Human Rights', January 16 2018, available at https://mdxminds.com/2018/01/16/how-to-save-the-european-court-of-human-rights-in-3-steps/.

relating to Article 3 "in the vast majority of cases national judges vote with the non-national judges, suggesting a good amount of independence."[70] He also noted that there is "no sustained evidence that judges were systematically beholden to their national governments on votes where national governments were not the respondent governments"[71] suggesting that judges are not "systematically motivated by geopolitics."[72] Voeten's article thus supports the thesis that strong post-election JSG practices are in congruence with judicial independence.

Despite the lack of empirical evidence that the Strasbourg judges acted in politically motivated ways, the diversity in quality and rigor of the national selection procedures has been framed as a continuing risk to the judicial independence of the ECtHR, even if this is more perceptual than practical. Lemmens, for example, notes that "the Council of Europe has to accept that states enjoy a wide discretion when it comes to establishing a list of three candidates"[73] and as such, the discretion that national governments have with regard to their national selection procedures presents a continuing threat to the judicial independence at the ECtHR.[74] In offsetting this perceived threat, the Committee of Ministers sets down guidelines [75] with regard to how the national selection procedure should be conducted. These guidelines contain detailed recommendations for the conduct of national selections, emphasizing openness and transparency. States are also required, when submitting the names of candidates to PACE, to describe the process used to select candidates.[76] PACE has also formally resolved to reject lists of candidates when they have been compiled "in the absence of a fair, transparent and consistent national selection procedure."[77] In October 2016, for example, it rejected the list of candidates provided by

[70] Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 American Political Science Review 417–433 (2008) at 426.

[71] *Id.* at 429.

[72] *Id.* at 431.

[73] Lemmens *supra* note 5, at 108.

[74] *See* Lemmens *supra* note 5, at 109–117 for a comparative description of the French, Belgian and British national selection process in 2012.

[75] Committee of Ministers, Resolution 2012 (40), *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*, 28 March 2012, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb1ac.

[76] Parliamentary Assembly of the Council of Europe, Resolution 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights,* 27 January 2009, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17704&lang=en.

[77] *Id.*

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Albania and Hungary because of insufficient national selections procedures.[78] There remains, however, significant variation between countries with regard to how they conduct these.[79]

II. JSG and Transparency: A mixed record

Alongside independence, transparency is the second value that, according to Dunoff and Pollack, is prioritized in the institutional design of the Strasbourg Court.[80] Their conceptualization of transparency, however, centers narrowly on judicial decision-making.[81] The fact that the names of the judges are published on all ECtHR decisions and judges are able to issue separate concurring or dissenting judgements is said to demonstrate a high degree of transparency. When considered in light of the totality of JSG practices at Strasbourg, we find that the effect of JSG in promoting transparency is more complex.

1. Transparency and the Advisory Panel

The introduction of the Advisory Panel to the judicial selection process seeks to improve the quality of judge candidates to Strasbourg, but the procedures of the Panel itself are not, and perhaps, cannot be, transparent. The work of the Panel is confidential and the Panel shares its findings only with the nominating state and PACE. For some, this raises the question of "who guards the guardians."[82] The commitment to confidentiality in the work of the Panel is justified on the basis of the candidates' privacy and the advisory nature of the Panel's role. Some, however, challenge the argument around candidates' privacy and reputation by noting that the existing system already creates the potential, perhaps even greater potential, to impact on a candidate's reputation as their names are made public at the nomination stage and then if they are not selected (or outright rejected) this leads to a significant deal of gossip and speculation about the reasons why. Alemmano notes, therefore, that "one may…contend that the current policy seems more effective in

[78] Parliamentary Assembly Council of Europe, *Election of Judges to the European Court of Human Rights: Progress Report*, 6 October 2016, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzAzOCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIzMDM4.

[79] *Supra* note 74. *See* also Open Society Foundations, Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners, 2017, available at https://www.icj.org/wp-content/uploads/2017/11/Universal-Strengthening-from-Within-Publications-Reports-2017-ENG.pdf.

[80] *Supra* note 2.

[81] *Supra* note 2, at 226: "…specifically mechanisms that permit the identification of individual judicial positions, primarily through the publication of separate votes or opinions."

[82] *Supra* note 1, at 212.

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protecting the panels' operation from public scrutiny than the candidates' reputation."[83] In response to this concern, he proposes greater transparency and argues that "transmission [of the Panel's opinions] to all Council of Europe contracting parties could provide this entity more teeth and help it gain more respect form all governments."[84] Greater transparency, it is argued, may also improve the panel's effectiveness "through strategic use of, *inter alia,* 'peer pressure' and 'name and shame' mechanisms."[85] Furthermore, he argues that all opinions should be disclosed publicly after the nomination procedure, which he argues might lead to an increase in the court's legitimacy.

The CCDH prepared a report into the functioning of the Advisory Panel in 2013.[86] In terms of confidentiality specifically the CCDH notes its preference to keep the rules on confidentiality as they are and this position was affirmed in its most recent 2017 report.[87] While transparency is an important value in matters related to the functioning of the Court, we think caution must be exercised in making the Advisory Panel's process and recommendations fully transparent. It is noted in several of the Panel's activity reports that, for whatever reason, there is a lack of candidates applying to be judges at the Court with high level judicial experience.[88] A completely transparent review process by the Panel, like that favored by Alemmano, may create yet another disincentive for suitably qualified and experienced candidates to apply. It is also unclear whether naming and shaming would adequately work to improve the quality of judges nominated by governments.

2. Court Administration and Transparency

While the output of Strasbourg judges is highly transparent information on how they work behind the scenes is much less clear. Very basic information about judges is available, for example, details of the salaries paid to judges are available online and a basic CV is published on the Court's website.[89] The internal workings of the Court, however, are less transparent and while we know that judges enjoy significant powers of JSG in the inner functioning of the court we know much less about *how* these powers are used.

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[83] *Id.* at 215.

[84] *Id.*

[85] *Id.* at 218.

[86] Steering Committee for Human Rights (CDDH), *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights,* 29 November 2013, available at https://rm.coe.int/168045fe14.

[87] *Id.* at para. 59. *See* also *supra* note 37, at para. 97.

[88] *See*, e.g. *supra* note 30, at 41 and *supra* note 34, at para. 42.

[89] *See* Judges of the Court*,* http://echr.coe.int/Pages/home.aspx?p=court/judges&c=.

In Judge Albuquerque's recent intervention, in a public talk at Middlesex University, his proposals to help bolster the Court's legitimacy and authority, included several related to transparency.[90] These suggested reforms highlight the lack of transparency in the operation of certain JSG functions at the ECtHR and specific proposals included the use of objective and transparent criteria and procedure to determine the composition of each Chamber and the Grand Chamber.[91] Chambers are currently set up by the Plenary Court based on proposals emanating from the Court President[92] and the Grand Chamber is created partially through the drawing of lots, with the Plenary Court deciding on the "modalities for drawing lots."[93] Judge Albuquerque's proposals also highlight the lack of transparency related to the involvement of the Jurisconsult and the Registry in the Court's judicial decision-making and he proposes that all sources of information relied on by the Court be made public, including that provided by the Jurisconsult.[94] These proposals should be welcomed as a way to make the operation of JSG at the Strasbourg Court more transparent, which, as Judge Albuquerque suggests, will have a positive impact on the Court's overall authority amongst its stakeholders, especially domestic parliaments and apex courts.

III. Accountability

Accountability is the value that, according to Dunoff and Pollack's theory is sacrificed in the design of the Strasbourg Court in favor of high levels of judicial independence and transparency.[95] The core focus of most scholarship and policy debates has been on the accountability of the Court as such rather than the accountability of individual judges. As part of the stocktaking exercise with respect to the 'Long term future of the European Court of Human Rights' that was started in the aftermath of the Brighton Declaration, a number of proposals have been made to address the accountability gap at Strasbourg in particular with respect to making the ECtHR more responsive to judgments of domestic supreme courts.[96] Our focus, below, however, is to examine the accountability of judges more at the individual level, looking both at external and internal mechanisms.

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[90] *Supra* note 69.

[91] *Id.*

[92] *Supra* note 48, at Rules 25 and 26.

[93] *Id*. at Rule 24e.

[94] *Supra* note 68.

[95] *Supra* note 2.

[96] *Supra* note 67.

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1. External Accountability

As noted previously, the introduction of the single term precludes the possibility that judges can be held accountable by States or by PACE through re-nomination procedures. It is also worth noting that the dismissal of judges is also a pure form of JSG as, according to Rule 7 of the Court's Rules, judges can only be dismissed from office based on a two-thirds majority of the other judges who believe that "he or she has ceased to fulfil the required conditions."[97] Furthermore, the dismissal procedure can be "set in motion" by any judge on the Court.[98] The rule that judges can only be dismissed by a majority vote of fellow judges, never practiced to this date, also points to the lack of powers by States or the Council of Europe as a whole to hold judges to account individually.

Despite the general lack of external accountability mechanisms, it could be argued that individual judges can be held accountable by way of naming and shaming tactics undertaken by external actors, for example, NGOs, commentators on Strasbourg jurisprudence, domestic supreme courts, parliaments and the executive. In the 2017 decision of *Bayev and Others v Russia,*[99] the dissenting judgment by Russian Judge Dedov, for example, has been analyzed as containing "outrageously homophobic statements that are unworthy of a judge at the European Court of Human Rights" including attempts to draw links between homosexuality and pedophilia.[100] In a commentary piece on the Strasbourg Observers site (a widely read blog post by followers of the ECtHR) questions were asked about whether Judge Dedov's comments in this case call into question his ability to meet the condition set down in Article 21 of the Convention to be of "high moral character" and there is a suggestion that he may have abused his position as a judge "to spread discriminatory discourse."[101]

Interestingly, in the commentary piece it is noted that "it is for the Parliamentary Assembly to avoid electing persons with such attitudes to the post of judge at the European Court" suggesting that once judges are elected to the position it is extremely difficult to discipline or remove them.[102] While the Strasbourg Observers have vowed to "keep an eye on" Judge Dedov it is unclear how this form of public naming and shaming would impact on any

[97] *Supra* note 48, at Rule 7.

[98] *Id.*

[99] Bayev and others v. Russia, App No. 67667, [2017] ECHR 572 (20 June 2017).

[100] Laurens Lavrysen, *Bayev and Others v. Russia: on Judge Dedov's outrageously homophobic dissent,* Strasbourg Observers, 13 July 2017, https://strasbourgobservers.com/2017/07/13/bayev-and-others-v-russia-on-judge-dedovs-outrageously-homophobic-dissent/.

[101] *Id.*

[102] *Id.*

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judge's conduct.[103] While we accept that the Court has several stakeholders, some of whom may be content with Judge Dedov's comments, we do think it is important to note that the high levels of independence and relatively low levels of accountability can lead to the situation where a judge on a human rights court espouses views in a decision that constitute discriminatory discourse against a marginalized group.

2. Internal Accountability

Given the general lack of external accountability mechanisms it could be argued that once elected, the accountability of the judges of the ECtHR becomes exclusively a matter of JSG. There are several internal accountability mechanisms at work in Strasbourg, all controlled by judges themselves. Internal judicial accountability for the decisions of Chambers are ensured with the possibility of referring a Chamber Judgment within three months of its delivery to the Grand Chamber. The Panel of the Grand Chamber decides on whether to accept requests for referral by applying certain criteria, which is set out in detail in guidance published by the Court.[104] While there is an internal review mechanism with regard to Chamber judgements, there is no equivalent with respect to decisions of single judge formations when cases are declared inadmissible on the grounds that they are manifestly ill founded. In 2016, the Court registered 53,500 new applications of which more than 50% (27,300) "were identified as Single-Judge cases likely to be declared inadmissible."[105] This demonstrates the extent of single judge formation decisions, for which there is currently no accountability.

Another very 'soft' internal accountability mechanism is the Resolution on Judicial Ethics, which was adopted by the Court in 2008 and sets out some very general provisions on how judges should behave during their time on the bench.[106] The Resolution is focused on enhancing public confidence in the Strasbourg bench by ensuring that judges do not act to compromise their independence and impartiality. It imposes very general and broad requirements, for example, that "judges shall perform the duties of their office diligently" and "shall exercise the utmost discretion in relation to secret or confidential information."[107] There are, however, no further accountability mechanisms detailed in the Resolution if judges fail to meet these requirements.

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[103] *Id.*

[104] European Court of Human Rights, The general practice followed by the panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention, http://echr.coe.int/Documents/Note_GC_ENG.pdf.

[105] European Court of Human Rights, Analysis of Statistics 2016, http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf.

[106] European Court of Human Rights, Resolution on Judicial Ethics, 23 June 2008, http://www.echr.coe.int/Documents/Resolution_ Judicial_Ethics_ENG.pdf.

[107] *Id.* at IV. and V.

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While this Resolution imposes certain standards for judicial behavior the Court's Rules of Procedure contain no formal disciplinary procedure for judges related to their non-judicial conduct. The Rules of the Court provides only the possibility for the dismissal of a judge but there is no detail on the precise procedure required if this process were started other than the fact that the ultimate decision to dismiss has to be taken by a majority of two-thirds of the elected judges. The taking of disciplinary proceedings against judges is also a sensitive matter as it, of course, has the potential to impact on the other value of judicial independence.

In terms of external non-judicial behavior all judges at the ECtHR enjoy diplomatic immunity although this can be waived by the Court at the request of a judge's national government. The diplomatic immunity also extends to the spouse and children of the judge as was observed in a recent case involving the wife of the former Romanian judge on the Court who was being investigated for corruption.[108] The ECtHR emphasized strongly that diplomatic immunity for judges and their families must be respected and that there is a procedure for requesting a waiver of immunity, which must be followed.[109]

It appears, based on our examination, that Dunoff and Pollack's theory on the Judicial Trilemma is largely borne out when explored specifically through the lens of JSG at the ECtHR, although, as we noted in the section on transparency, their theory does rest on particular understandings of the different values, which remain contingent and subjective concepts.[110] While legitimacy was a value not addressed in Dunoff and Pollack's theorization of the Judicial Trilemma we believe that it warrants attention of its own, primarily because it was one of the principal reasons used to justify the JSG reforms at the Court, particularly with regard to judicial selection.

IV. Legitimacy

In their grounded empirical study of the legitimacy of the ECtHR, Çali, et al. note that differently situated actors (judges, lawyers and politicians) in different domestic contexts vary in their "legitimacy constructions" of the Court and also in the conditions that would lead to "legitimacy erosion."[111] The legitimacy concerns tied to the ECtHR have both input

[108] Valentina Pop, *Strasbourg backs Romanian judge in jewellery-for-verdicts case*, EU Observer, 20 October 2011, https://euobserver.com/justice/114006.

[109] *Id.*

[110] For a response to Dunoff and Pollack's *Judicial Trilemma* and a differing perspective on the value of judicial independence, *see* Helen Keller & Severin Meier, *Independence and Impartiality in the Judicial Trilemma,* 111 AJIL Unbound 344–348 (2017).

[111] Çali et al., *supra* note 15, at 969.

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and output oriented dimensions, raising not only concerns about judicial selection procedures, but also about the kinds of judgments delivered by the Court, regardless of who the judges are. In their study, Çali et al. find that the quality of judges at Strasbourg (input legitimacy) was a key concern expressed by their interviewees particularly amongst apex courts in the UK, Ireland and Germany.[112] In the recent Copenhagen Declaration the quality of judicial selection is also framed as a legitimacy concern.[113] This concern with respect to the quality of judges and the need to attract the respect of domestic apex court judges also corresponds closely with the rationales for the introduction of some of the JSG practices, particularly the Advisory Panel and the recent reforms aiming to introduce expertise into the PACE Committee. In the first activity report issued by the Advisory Panel its creation was indeed directly tied to legitimacy concerns:

> The legitimacy of the Court as a judicial institution in the eyes of national institutions, Governments and supreme or constitutional courts is vital to the continuing effectiveness of the system based on the European Convention on Human Rights ("the Convention"), and the respect for the integrity and quality of the Court's judgements at national level. For the foregoing reasons it is crucial that candidates presented for election to the Court are persons of high standing with all the special professional qualities necessary for the exercise of judicial function as a judge of an international court whose decisions have such an impact in all High Contracting Parties.[114]

These legitimacy considerations have also led the Panel, in its subsequent activity reports, to express concerns about the candidates that they are assessing, in particular, about their lack of judicial experience in higher courts and the Panel's view appears to be that these legitimacy concerns are best addressed by electing candidates specifically with lengthy judicial experience.[115] This focus on judicial experience in the Panel's published reports is perhaps not surprising given that the Panel itself is made up exclusively of high level judges. While the Convention does create the possibility for "Jurists of recognized competence" to be elected as judges, and the Panel sets out its view on how this should be

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[112] *Id.* at 970–971.

[113] *See supra* note 38, at para. 55.

[114] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Final activity report for the attention of the Committee of Ministers*, 11 December 2013 at para. 1. Available at https://dm.coe.int/CED20140017598.

[115] *Supra* note 88.

assessed, there appears to be a preference for candidates with judicial experience given the frequent references to the Panel's disappointment at the lack of candidates with "substantial judicial experience, particularly in the highest courts."[116] The former Chair of the Panel, John Murray, notes that there is "a very high proportion of candidates who are just qualified."[117] These candidates may be "very fine lawyers of good standing" but are lacking "the degree of experience, of long or mature experience, at a high-level which gives them the qualities necessary for the exercise of judicial function at the level of a court such as the European Court of Human Rights."[118]

The propensity for governments to propose 'just qualified' candidates is seen as a key threat to the Court's legitimacy where "the real danger is that the Court could be perceived as a committee of experts rather than a judicial body, which would undermine its credibility."[119] This point is emphasized by the Panel and in its latest activity report it is argued that electing judges to the Court who have high level judicial experience in Member States "obviously will have positive repercussions for the reputation of the Court."[120] This demonstrates that the implementation of a JSG practice like the Advisory Panel, while it may have had some positive impacts, is only able to effect change within the limits of the caliber of candidates that are proposed. It is not necessarily the case that national governments are preventing high level judges from applying but rather that, for whatever reasons, such candidates appear not to be attracted to applying, which the Panel acknowledges in its reports.

The view that senior domestic judges on the bench of the ECtHR would improve the legitimacy of the Court also finds support in quantitative studies on compliance with the judgments of the Court. Voeten, for example, proposes that having more judges with judicial experience may lead to greater compliance of its judgements.[121] To evaluate the links between compliance and judicial experience Voeten uses the length of time between the issuing of the judgment and the adoption of a final resolution by the Committee of Ministers as the key variable and compares this to "the proportion of the ECtHR panel (chamber) whose former career was primarily that of a judge."[122] His results suggest that

[116] *Supra* note 30, at para. 41.

[117] *Supra* note 34, at p.17.

[118] *Id.*

[119] *Id.*

[120] *Supra* note 30, at para. 34.

[121] Erik Voeten, *Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights,* available on SSRN <ssrn.com/abstract=2029786>.

[122] *Id.* at 9 and 12.

judgments written by panels with former judges are implemented more quickly.[123] While Voeten explores various hypotheses on why judgements written by professional judges are more likely to be implemented he is unable to draw any firm causal conclusions.[124]

The "judicialisation" of the ECtHR bench, however, also gives rise to output legitimacy concerns.[125] Madsen, for example, holds that career judges are less equipped to navigate the complex interactions between human rights law and international politics and tailor their judgments to the contemporary political contexts. He goes on to argue that "success as an international court very often requires a dose of diplomacy", which is "somehow lost in Strasbourg now"[126] and that "the current procedures for attracting new judges do not seem to strike a good balance between specialized law and an appreciation of the inherently political nature of human rights."[127] This discussion points to the tensions between different perspectives on the legitimacy of the ECtHR. Whilst in the eyes of some, the increase in experienced judges enhances the legitimacy of the ECtHR and increases compliance rates with its judgments, in the eyes of others, the over judicialisation of the bench may risk severing the progressive development of human rights as a moral and political project and create a legally conservative court unable to face the contemporary human rights challenges in Europe.

Beyond judicial selection, legitimacy concerns are also expressed with regard to the judicial activities of the judges and the Court as a whole once elected. In this respect, the debate centers on the judicial positions taken by the judges individually, in Chamber or Grand Chamber formations and whether their decisions are seen as acting in ways that are normatively justifiable as judges of a European Court of Human Rights. In different Council of Europe states and publics, what counts as a normatively justifiable position for a judge of the ECtHR has been subject to diverse considerations.[128] While some states view the Court and its judges as too interventionist and activist, others have concerns in the opposite direction, with worries about the Court failing to intervene adequately and strongly in reviewing the decisions of national courts, parliaments and executives. The insertion of the 'margin of appreciation' into the preamble of the Convention following the Brighton Declaration can be seen as a request from the member states to the judges of the

[123] *Id.* at 19.

[124] *Id.* at 32.

[125] Mikael Rask Madsen, *The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015).

[126] *Id*. at 278.

[127] *Id.*

[128] Çalı, et al., *supra* note 15.

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Court to act in more deferential ways to domestic parliaments and supreme courts.[129] Increasing the perceived legitimacy of the ECtHR amongst states that prefer a more deferential court, however, stands in conflict with the principle of the ultimate independence of the judges once elected. We also note that there are several JSG practices at the Court that may have an impact (although we do not know to what extent) on the direction that the Court's jurisprudence takes, e.g. the Jurisconsult and the Bureau. The margin of appreciation was inserted into the Convention based partly on concerns that the Court's practices were violating the democratic principle by failing to respect the positions reached by democratically elected domestic parliaments. In the following section we explore the extent to which JSG practices at the Court respect, or not, this key principle as well as how JSG affects the separation of powers at the Council of Europe.

D. Separation of Powers and Democratic Principle

Our position is that the existing levels of JSG at the ECtHR reflects a commitment to the separation of powers and to respect of the democratic principle. Political masters are ultimately responsible for the selection and election of judges given that the Advisory Panel's powers are non-binding and aim at quality assurance of the candidates only. The fact that the judges, once elected, enjoy high levels of JSG in the running of the Court is itself respectful of the separation of powers in terms of limiting the potential for executive or legislative influence on the Court's judicial decision-making. It is crucial for the Court to function without the risk of political influence on its day to day administration and by extension in the judicial activities of its judges.

The high levels of judicial independence of ECtHR judges post-election, however, has raised concerns with regard to its compatibility with the democratic principle.[130] Proponents of this view hold that some judgments of the ECtHR run counter to the democratic decision making by domestic parliaments. The tension between the interpretive authority of the ECtHR and democracy is a perennial one as it is widely accepted that democratic decision making alone does not make any state immune from rights-based Strasbourg review. It has been argued, however, that the democratic selection of judges, by democratically elected parliamentarians, together with the relatively weak review powers of Strasbourg judges (as

[129] Some have argued that this had an important effect on the Court's case law. *See* Oddný Mjöll Arnardóttir, *Rethinking the Two Margins of Appreciation*, 12 EUROPEAN CONST. LAW R. 27–53 (2016) and Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMPORARY PROBLEMS 141 (2016).

[130] *See* Richard Bellamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights,* 25 EUROPEAN J OF INTL L 1019–1042 (2014).

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they do not have the power to strike down legislation) do adequately address the concerns expressed with regard to democratic legitimacy.[131]

The view that there must be vigilance to ensure that JSG at the Court does not undermine the democratic principle has also found its reflection in political capitals and culminated in the insertion of the principle of the margin of appreciation into the preamble of the Convention following the deliberations in Brighton in 2010.[132] It must be noted, however, that the insertion of this doctrine into the preamble does not alter judicial independence as the most protected value of the Strasbourg JSG arrangement. The judges are still free to decide when this principle is employed and when the Convention interpretation must give way to democratic decision making. Yet, a recent study by Madsen shows that post Brighton decisions of the ECtHR place significant emphasis on the margin of appreciation.[133] The political masters of the ECHR, therefore, have been able to influence judicial decision making in favor of domestic institutions without altering the JSG structures in place at Strasbourg.

In terms of judicial selection, the existing procedures, present a careful balance between executive, legislative and judicial input into the selection of judges. The most powerful body remains PACE. National parliamentarians have the ultimate power and authority to appoint judges from a list of three options. The Executive has its role in judicial selection through the initial submission of candidates although the process of national selection varies significantly from country to country in terms of executive influence on the creation of the final list of candidates.[134] While the Advisory Panel has introduced an element of JSG into this process it remains constrained by the actions of both the national governments, in terms of the candidates proposed, and by PACE with respect to who is ultimately elected as a judge. The operation of a two stage scrutiny process of candidates by the Advisory Panel and the PACE Committee means that the Advisory Panel's recommendations are themselves subject to some oversight by the legislature.

While the Panel has lamented the few occasions where candidates have been maintained on the lists submitted to PACE despite their negative assessment it could be argued that

[131] *Id.* at 1036–1037. Bellamy describes the Court's review powers as "a 'soft' version of strong review" on the grounds that the rulings are binding on High Contracting Parties but the Court does not have the power to strike down national laws.

[132] European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[133] Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?* (June 27, 2017). Forthcoming in JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT; iCourts Working Paper Series No. 100. Available at SSRN: https://ssrn.com/abstract=2993222.

[134] *See supra* note 74.

PACE, as elected representatives, can and should disagree with the Panel if it sees fit. The former Panel Chairperson, John Murray, seemed to suggest that PACE "has the right and power" to decide that a candidate is *not* qualified even if the Panel reached a positive finding on their eligibility but that they should not "consider qualified somebody whom the Panel did not."[135] This, seems to us, to amount to over-reach on the part of the Panel, which is essentially there to advise PACE on how to fulfil its role as the ultimate authority on judicial selection.

The Court must also remain vigilant that proposals for further reform to the judicial selection procedures do not tilt the balance of separation of powers too strongly in favor of the judiciary at the expense of the other branches. There appears to be no appetite to give the findings of the Advisory Panel any legally binding quality. This coheres with the separation of powers and the democratic principle. In remarks to a meeting of Ministers' Deputies in March 2017 the former Panel Chair made it clear that while the creation of the Panel "has strengthened the overall process of selection" that "structural changes to improve the process must still be considered."[136] He does not offer any concrete proposals but notes that this could be done in several ways like strengthening "the obligation of governments to consult the Panel" or creating a "more structured connection" between the Panel and PACE.[137] One possible idea would be to have a member of the Panel present during the PACE Committee's deliberations to help build "mutual trust"[138] and we note that this proposal has been endorsed by the CDDH in their 2017 review of judicial selection.[139] We further note that the recently adopted Copenhagen Declaration states that "there is still room for improvement in several areas"[140] of the judicial selection process and goes on to endorse the CCDH recommendations.[141] While there may still be room for improvement in how the national governments, the Advisory Panel and PACE communicate we believe that the elected representatives must continue to have the final say on judicial selection.

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[135] *Supra* note 34, at 18.

[136] *Supra* note 30, at 22 and 25.

[137] *Supra* note 30, at 25.

[138] *Id.*

[139] *Supra* note 37, at para. 96–97.

[140] *Supra* note 38, at para. 57.

[141] *Id*. at para. 62.

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E. Conclusion

There are several stories to tell with regard to JSG practices at the ECtHR from the "embryonic"[142] forms of JSG in the judicial selection process to the strong levels of JSG that judges enjoy once elected. The JSG practices and reforms further interact with the substantive values of independence, transparency, accountability and legitimacy in different ways. We noted that the aim of the JSG reforms to the judicial selection process were rooted in concerns about independence and legitimacy. However, it is also clear from pre-existing empirical work that legitimacy concerns relating to the quality of judges was not shared universally[143] and despite a perception of concerns about judicial independence, the evidence showed this to be relatively strong prior to any reform process.[144] Nevertheless, the introduction of greater JSG in judicial selection, by way of the Advisory Panel, is to be welcomed as an additional quality control mechanism that appears to be having a positive impact despite the concerns that remain with regard to its recommendations being followed in every case.

Transparency is not a value that is consciously promoted, through the operation of JSG at Strasbourg, and in fact, the JSG practices both in terms of judicial selection and court administration are decidedly non-transparent. We welcome the recent proposals made by Judge Albuquerque,[145] in terms of improving transparency in certain aspects of court administration but remain skeptical of suggestions that the judicial selection process should be made more transparent as this risks undermining attempts to attract highly qualified candidates to the role. The operation of JSG at the ECtHR leads to a relatively weak level of accountability, which fully accords with the "judicial trilemma"[146] that international courts face and appears to be the tradeoff that the Council of Europe has made in prioritizing the other values mentioned above.

Supranational courts, like the ECtHR, will always have to strike a fine balance between creating a robust and independent judiciary free from political and state influence while ensuring that the institution continues to maintain its authority, legitimacy and the respect of its key stakeholders. We believe that the operation of JSG at the ECtHR, in its current form, manages to strike this balance well in terms of respecting the democratic principle and the separation of powers. Caution must be exercised, when considering any future reforms to JSG at the ECtHR, that this very fine balance is maintained.

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[142] Alemmano *supra* note 1, at 249.

[143] Cali et al *supra* note 15.

[144] Voeten *supra* note 69.

[145] *Supra* note 68.

[146] *Supra* note *2.*

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