

Turning point: maintaining the independence of the European Court of Human Rights

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2015 is a crucial year for the European Court of Human Rights: a new president will be elected, a large number of judges will be replaced along with the Deputy Registrar (Michael O'Boyle has already retired) and the Registrar (Erik Fribergh will retire soon). One can argue that the Court is going through a turning point in its history. It is not the first one (and hopefully not the last) but it is crucial that the Court emerge from this turn stronger than ever.

It seems that now is the right moment to discuss the independence of the European Court of Human Rights. I have argued [elsewhere](#) that the perceived independence of the Court is a key to its legitimacy and that a proper, transparent and clear procedure of selection of judges is a basic requirement of such independence.

The selection of judges can be divided in three stages. First, the national government proposes a list of three candidates: this part is crucial for selection of independent candidates of high calibre. At this stage, the government nominates the three most suitable candidates from a broad sample of applicants. Yet, governments should realise that they do not select 'their' representatives on the bench but rather independent adjudicators that can enhance the reputation of the Court, both in the State concerned and Europe-wide. In some countries, however, loyalty to the current government remains the key selection criterion; instead of getting respectable judges, the Court might end up with second-best candidates with an agenda in cases against their home State. Having said that, loyalty to the government is a counterproductive criterion for a number of reasons. First, the 'dependent' judges might have a very low impact on the rest of the bench as he or she might be regarded by other judges not as a colleague but almost as a representative of the party whose opinion should not be given as much weight. Moreover, a selection procedure which is not perceived as fair within the State (e.g. – by civil society) undermines the chances of the government to select the best candidates. The best candidates would be reluctant to apply if loyalty to the government is considered as the most important factor.

Before the list is submitted to the Parliamentary Assembly of the Council of Europe, which elects one candidate from the shortlist, it is reviewed by an independent advisory panel, which may advise the government to reconsider the list if one or more candidates do not satisfy the criteria laid down in Article 21 of the Convention: '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.' The recommendations of the panel are not binding but they will become known to the Parliamentary Assembly in case the government insists on its list.

The second stage of the process is an interview in a [special committee for the election of judges](#). While this is a very important step in the process, the members of the committee can only assess those candidates who were shortlisted by the government. They can recommend that the list be rejected; alternatively, they can recommend that one of the candidates to be elected. This is a very important stage, as the Parliamentary Assembly has almost always followed the recommendations of the Committee in the past.

The final stage of election is the vote in the PACE. While voting is also very important and adds some democratic legitimacy to the whole process, it cannot be seen as an effective damage control procedure. The parliamentarians are limited to the list of three names, most of whom are barely known to them.

As aforementioned, despite the fact that the committee for the election of judges is an important quality check, the most crucial stage of the process is clearly the national round of selection, as this is where the list of potential candidates is narrowed down from the dozens of original applicants to the final three. It should have clear and foreseeable rules, the information about the competition should be publically available and the selection committee should be independent from the executive branch of government.

In practice, however, this first stage is the most problematic. The ongoing process of selection of judges is a good illustration of the challenging national selection processes. For instance, the Slovakian list has already

been rejected [twice](#) and the PACE is expecting a new submission. Needless to say, a single rejection should be considered a 'cold shower' for everyone involved in the process as it is an embarrassment for the government and for the shortlisted candidates involved. Two rejections clearly shows lack of political will to cooperate with the PACE on this issue.

The national selection processes in Armenia and Azerbaijan are also problematic and there was cause for concern amongst their respective civil society groups. In the 1990s, the conflict over the Nagorno Karabakh region effectively stopped all relations between these two states. However, they face surprisingly similar challenges when it comes to the selection of judges. The lack of transparency and apparent selection of unqualified candidates is evident. There is a high possibility that both the Armenian and Azerbaijani lists will be rejected, causing delays in hearing cases from these countries and disrupting the effectiveness of the Court in relation to these countries. Pursuant to the Convention the national judge should be on the bench when the Chamber or the Grand Chamber of the Court is hearing cases against his or her state.

The key problem areas that the committee for the election of the judges might face are the following:

1. Lack of expertise: the candidates have to be highly qualified in both national law and law of the European Convention on Human Rights. With some initial support the judges should reach their top speed within months. However, if the judge have very little understanding of the working methods of the Court this initial phase of integration into the Court might take years.
2. Lack of linguistic skills: the court is bilingual in English and French. For the majority of the judges, neither English nor French is their mother tongue. It is perhaps possible to get away with one of them in the beginning but the level of at least one language should be appropriate. Unfortunately, this is not always the case.
3. Lack of understanding of the judicial function: the judges are not the representatives of their governments on the bench. It sounds like a truism but in practice it is not. While one can argue that the role of the national judge (even if he or she is not wholly independent) would be outweighed by other judges, this is not a convincing argument because each and every judge on the court should only be loyal to human rights and values of the Council of Europe and not to their government.

Although this post identifies certain problems with the selection of judges, I do not want to say that there are only problems. The majority of the judges are brilliant lawyers, completely independent and vocal defenders of human rights in Europe. This should continue to be the case; otherwise, the legitimacy of this court will deteriorate. For that the civil society, the media and international community should closely monitor the national selection of candidates to the European Court of Human Rights.

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