

The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights



**A short guide on the Panel's role
and the minimum qualifications
required of a candidate**

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The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights

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and the minimum qualifications
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French edition:
*Le Panel consultatif d'experts
sur les candidats à l'élection de juges
à la Cour européenne
des droits de l'homme*

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Note: This guide has been prepared by the Secretariat of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights and does not bind the Panel itself. It is primarily aimed at those involved or professionally interested in the selection of the candidates concerned.

The material in this guide is taken mainly from the Panel's 4th activity report of 31 July 2019. Inspiration was also derived from Christoph Grabenwarter and Matti Pellonpää, "High Judicial Office' and 'Jurisconsult of Recognised Competence': Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court", *ZaöRV* Vol. 80, 2020, pp. 1-22.

” The process of establishing and maintaining the reputation of the Court ... is to a large extent dependent on the quality and experience of the judges.¹

INTRODUCTION

The judges

Under the European Convention on Human Rights (“the Convention”):

- ▶ there is one judge on the European Court of Human Rights (“the Court”) for each contracting state to the Convention (currently 47 contracting states);
- ▶ judges serve a single, non-renewable nine-year term;
- ▶ judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates put forward by the government of the contracting state concerned.²

The minimum qualifications for being a judge on the Court are set out in Article 21, paragraph 1, of the Convention:

The judges shall be of high moral character and must either possess the qualifications for appointment to high judicial office or be jurisconsults of recognised competence.

The creation of an advisory vetting panel

The declaration adopted at the High Level Conference on the Future of the European Court of Human Rights in Interlaken in February 2010 called on the contracting states to ensure “full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language”.

1. Paragraph 41, 4th activity report.
2. Articles 20, 22 and 23 of the Convention.

Later that year, in November, as part of the implementation of the Interlaken Declaration, a resolution of the Committee of Ministers of the Council of Europe³ created the Advisory Panel of Experts on Candidates for Election as Judge to the Court (“the Panel”). The aim of this initiative was to strengthen the appointment process by adding an element of independent, essentially judicial expertise.

The undertaking assigned to the Panel under the Committee of Ministers’ resolution is to advise the contracting states on whether candidates for election meet the conditions stipulated in Article 21, paragraph 1, of the Convention.⁴

The Panel is composed of seven independent experts, who are largely former judges of the Court or serving or former judges of national supreme or constitutional courts.

The procedure before the Panel

The Parliamentary Assembly normally launches the election procedure for a given state at least a year in advance of the expiry of the term of office of the sitting judge. The Panel also receives a copy of the letter beginning the process. Once the procedure has been launched, the Panel invites the government concerned to send it – before submitting anything to the Parliamentary Assembly – the names and CVs of the candidates proposed, together with information on the national selection procedure.

A government is also expected to supply details of the national selection procedure followed. While the Panel has no express power of review in this domain, in its final views on the candidates it may, where appropriate, draw attention to aspects of the information provided by the government on the national selection procedure, notably with regard to fulfilment of the requirements of fairness and transparency.

The procedure before the Panel is confidential and written, in the sense that there are no interviews of the candidates. The Panel may request the government to provide additional information or clarification. In addition to the CVs and any further information provided by the governments upon the Panel’s request, the Panel has on several occasions received unsolicited information from various sources (for example, non-governmental organisations and

3. Resolution CM/Res(2010)26 of 10 November 2010.

4. The resolution also refers to the qualifications set out in Paragraph II of the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights (document CM(2012)40-final, adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers’ Deputies).

individuals). The Panel does not actively seek information from such sources, nor does it systematically pay attention to unsolicited information. However, it may put questions to a government in the light of unsolicited information when it appears appropriate to clarify a relevant issue, in particular about the candidates' competences and qualifications. In any case, the Panel's final assessment of a candidate's suitability will only be based on material supplied by the government.

If the Panel takes the view that all three candidates possess the qualifications for being elected as a judge to the Court, its terms of reference require it to so inform the government without further comment. If one or more candidates are not considered to be qualified, reasons for this conclusion will be given in the Panel's written response to the government. In that event, the government is expected, though not obliged, to submit new candidates.

The Panel seeks to adopt its final views on the candidates as far as possible by consensus. If this proves impossible, decisions on adoption of final views require a qualified majority of five out of seven. It is therefore possible that the Panel finds itself in a position where it cannot adopt final views.

The relations between the Panel and the Parliamentary Assembly

The Panel also informs the Parliamentary Assembly in writing of its final views on the candidates once the list of candidates is received by the Parliamentary Assembly.

Within the Parliamentary Assembly there is a specialist committee – the Committee on the Election of Judges to the European Court of Human Rights – that interviews the candidates and makes a recommendation to the plenary Assembly. The chair or a representative of the Panel is invited to participate in the briefing session held by the committee before it carries out the interviews, in order to explain the reasons for the Panel's views on the candidates. In this way, a fruitful collaborative dialogue has been established between the Parliamentary Assembly and the Panel.

In addition, the policy of the Assembly is to reject a list not only when one or more of the candidates do not fulfil the conditions laid down in Article 21, paragraph 1, of the Convention, but also if the Panel has not been duly consulted.

The Panel, though functioning independently from the Parliamentary Assembly, has thus come to play a complementary, preparatory role in the parliamentary process of electing the judges.

Relevant articles of the Convention concerning the election of judges to the Court

Article 21, paragraph 1: "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."

Article 21, paragraph 3: "During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office ..."

Article 22: "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."

Article 23, paragraphs 1 to 3:

"1. The judges shall be elected for a period of nine years. They may not be re-elected.

2. The terms of office of judges shall expire when they reach the age of 70.

3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration."

CRITERIA FOR EVALUATION OF THE QUALIFICATIONS OF THE CANDIDATES

The minimum qualifications laid down in the Convention for serving as a judge on the Court are:

- ▶ being of high moral character; and
- ▶ either possessing the qualifications required for appointment to high judicial office;
- ▶ or being a jurisconsult of recognised competence.

This does not, of course, exclude candidates who fulfil both the latter conditions.

“Being of high moral character”

In the Panel’s activity reports, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of conviction for crimes have been mentioned as key components of this requirement, as well as (obviously) independence and impartiality.

However, generally speaking, the Panel has to assume that these conditions are met. A candidate’s character is hardly ever open to being assessed on the basis of what appears in the CV. In particular, it will only be when something is manifestly apparent from the CV (for example, if there is mention of the commission of a criminal or disciplinary offence) that a negative judgment as to character can be made. Consequently, in practice, issues concerning a candidate’s “high moral character” have rarely arisen and no manifest problems under this head have ever been signalled by the Panel in its views.

Generally concerning the other two conditions

Having as judges at the Court individuals who come from high-level positions in the contracting states will obviously have positive repercussions for the standing of the Court. This is especially important for the acceptance, notably by the highest national courts, of the Court’s case-law. In addition, “the [Convention] system will fail if judges do not have the necessary experience and authority”.⁵

As the two alternative conditions stated in Article 21, paragraph 1, of the Convention are very generally worded, they necessarily call for interpretation. Since its creation, the Panel has devoted considerable effort to elucidating what these two conditions mean in concrete terms in relation to the various career paths outlined in the candidates’ CVs.

In the words of the Panel, the governments when presenting a list of candidates and, subsequently, the Parliamentary Assembly when electing the members of the Court are under a responsibility to ensure that the candidates proposed are of **mature professional experience and possess unquestionable qualifications for the exercise of a high judicial function on the international plane**.⁶ In the broadest terms, the fundamentals underlying both these conditions have therefore been understood by the Panel as requiring **professional experience of long duration at a high level**.

5. The letter of 9 July 2010 from the then President of the Court (Jean-Paul Costa) to the Committee of Ministers, quoted in the 4th activity report, paragraph 49.

6. 4th activity report, paragraph 45.

Knowledge of human rights is only one, albeit an important, component of the overall examination of the person's career that the Panel carries out.

Although the two conditions are presented by the Convention as being distinct and alternative (“either ... or”), it may nonetheless be that a combination of elements falling under the two heads is considered by the Panel as being sufficient. Thus, even though a candidate does not possess the qualifications required under either head when considered alone, a combination of judicial activities and academic or other relevant legal work may in an overall assessment justify a conclusion to accept the candidature (usually on the ground of the candidate being a “jurisconsult of recognised competence”).

“Possessing the qualifications required for appointment to high judicial office”

Since the Court may implicitly overrule the highest national courts, its composition should not create the impression that the professional level of some of its judges from the national judiciary is inferior to that of their peers on those national courts or other international, including European, courts.⁷ It can be taken that the Panel will be guided by this consideration in its interpretation and application of the condition of “possessing the qualifications required for appointment to high judicial office”.

This expression can be understood as in principle covering judges who hold or have held office in national supreme or constitutional courts. At the other end of the scale, it would seem to exclude judges of lower national first-instance courts (unless they qualify under the alternative head of jurisconsult).

The expression would also presumably be capable of applying to judges who sit on appeal courts or courts just below the country's highest courts, provided that they have “mature professional experience” and a strong CV in other respects (for example, with an impressive list of scholarly publications). In contrast, even in the case of candidates holding office in a highest national court, the Panel's view is that such persons would not, for that reason alone, be automatically qualified to be candidates for the Court.

Thus, although the expression is evidently meant to refer to the judicial system in the member state concerned, the formal possession of the qualifications for appointment to high judicial office at national level is not necessarily sufficient. Indeed, national judicial structures vary considerably, with, for example, it being possible in some countries for a person to be nominated to a supreme court or a constitutional court at a relatively young age.

7. Grabenwarter and Pellonpää, *op. cit.*, p. 17.

Bearing this variation in mind, the Panel is careful to undertake a global assessment of the entire “judicial” career of a candidate, including whether he or she has been involved over a long period⁸ in judicial activity concerned, directly or indirectly, with complex interpretative issues of law or enforcing human rights. The kind of court (civil, criminal, administrative, asylum, family, labour and so on) in which the judge has worked at different periods of his or her career and their level of jurisdiction – higher or lower – will also be relevant.

The Panel is of the view that the contracting states should take every reasonable step possible to encourage a greater number of very experienced judges from the highest courts to make themselves available as candidates for election to the Court.

“Being a jurisconsult of recognised competence”

“Jurisconsult”⁹ is a rather antiquated word for an expert in law. It denotes a person who is highly knowledgeable about the law but who is not necessarily a practising lawyer or a judge. In short, a legal scholar. The qualifying phrase “of recognised competence” shows that something over and above expertise in the law, even great expertise in the law, is meant.

According to a definition proffered by the then President of the Court in the run-up to the creation of the Panel:

- ▶ to be a “jurisconsult of recognised competence” requires extensive experience in the practice and/or teaching of law;
- ▶ extensive experience of teaching the law generally entails the publication of important academic works;
- ▶ one objective indicator of the existence of such experience is the length of occupation of a professorial chair.¹⁰

The Panel itself considers that, for a person pursuing an academic career, the level of “recognised competence” has been reached when the person has been **a professor at a university of standing for many years and has published important works**, including work relating to the protection of human rights and the relationship between those rights and the constitutional functions of states.

8. This is a point made by Grabenwarter and Pellonpää, *op. cit.*, p. 15, who suggest experience as a (career) judge of at least 10 to 15 years.

9. The term was borrowed from the equivalent clause in the Statute of the International Court of Justice.

10. Jean-Paul Costa letter: *op. cit.*

The selection of **persons other than academics**, such as advocates, prosecutors, ombudspersons, diplomats, legal advisors of governmental and non-governmental organisations and, generally, legal professionals in the public (including political) or private domains, is also possible. This is particularly so where they have, through their career, acquired professional intimacy with the functioning of courts or human rights issues – subject always to the requirement that they have the mature professional experience expected of “jurisconsults of recognised competence”.

Many, if not most, of the candidates that the Panel has found to fall short of the standard of “jurisconsults of recognised competence” were excellent academics or experts learned in the law and, no doubt, in good standing with their professional peers but who nonetheless, being at a fairly early stage of their careers, had not yet had **the necessary length or breadth of experience**. It should be remembered that Article 21, paragraph 1, of the Convention is concerned with the election of international judges called on to adjudicate in cases that are liable to be complex or sensitive, brought against states, and not simply with the appointment of competent experts on, say, an intergovernmental committee.

While experience in the field of Convention law, or fields of law relevant to it, is a highly material factor to be taken into account, the essential qualifications to adjudicate on Convention issues can be acquired in a number of ways other than working with such issues on a day-to-day basis. A professor of European and/or public international law, for instance, should normally be regarded as having competence in the field covered by the jurisdiction of the Court, even if he or she has not specialised in human or fundamental rights. The same would be true for professors of constitutional law. Professors in these and other fields should, however, show some real engagement during their career with questions of human rights related to their field of law.

The Panel may also take into account as a relevant factor whether any academic experience (or other experience for non-academics) has been complemented by advising on or appearing in cases involving human rights law or constitutional issues, or by membership of national or international supervisory bodies in fields connected with human rights.

Language knowledge

In accordance with the Committee of Ministers’ Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess

at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.

Gender balance

Finally, the Panel also takes into account the need for gender balance, which is also spelt out in the Committee of Ministers' guidelines. As a general rule, lists of candidates must include at least one candidate of each sex, unless a single-sex list of candidates is composed of an under-represented sex on the Court (under 40% of judges) or there are exceptional circumstances.

CONCLUDING REMARKS

The primary responsibility lies with the contracting states to fulfil their treaty obligations by selecting only candidates who, in a substantive way, fully meet the conditions stated in Article 21, paragraph 1, of the Convention. A vacancy on the Court is a vacancy for a high judicial position in the international sphere and requires the election of a person who can, among other things, exercise sound judgment based on mature professional experience.

The Panel's mission in advising the governments of the contracting states does not at all encompass pronouncing on the comparative merits of the candidates. It is limited to offering an expert view on the narrower question of whether, on the basis of their CVs, the candidates proposed can be regarded as fulfilling the minimum conditions laid down in Article 21, paragraph 1, of the Convention for being able to serve as a judge on the Court.

While its views are primarily addressed to the governments of the contracting states in order to aid them in presenting lists of high-quality candidates, in practice the Panel also assists the Parliamentary Assembly in relation to the question of whether the Assembly has before it three candidates who fully satisfy the Convention conditions for election as a judge to the Court.

Over time since its creation, the Panel has progressively elaborated criteria for deciding when the two generally worded alternative conditions stated in Article 21, paragraph 1, of the Convention (either "possessing the qualifications for appointment to high judicial office" or "being a jurisconsult of recognised competence") are satisfied in practice. Those criteria will continue to be refined and developed, facilitating the tasks of both the national selection authorities and the Parliamentary Assembly.

OVERALL PROCEDURE FOR THE SELECTION AND ELECTION OF JUDGES

First stage of the process of election of judges to the Court

- ▶ At least a year before a state's judge is due to finish their term at the European Court of Human Rights, the **Parliamentary Assembly of the Council of Europe** launches the process to find a replacement.
- ▶ The **Assembly** notifies the government concerned of the start of the process by letter – a copy of this letter also goes to the **Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights**.
- ▶ The **Panel**, referring to the Assembly letter, invites the government to submit to it a list of three candidates, together with their CVs and details of the national selection procedure, before sending anything to the Assembly.



Consultation of the Advisory Panel

- ▶ The **Panel**, following a confidential procedure, examines the CVs and may put questions to the government on candidates or on the national selection procedure.
- ▶ Candidates must in the first place fulfil the conditions laid down in Article 21, paragraph 1, of the Convention:
 - being of **high moral character**; and
 - either possessing the qualifications required for appointment to **high judicial office** or being **a jurisconsult of recognised competence**.
- ▶ In addition, as spelt out in the Committee of Ministers' guidelines:
 - candidates should have an active knowledge of either English or French, the two official languages of the Court;
 - there should be a balanced representation – at least one of each sex, unless the sex of the candidates on the list is under-represented on the Court.
- ▶ Governments must, among other things, demonstrate that their national selection procedure was fair and transparent (Assembly Resolution 1646).

- ▶ The Panel decides (by written procedure or at a meeting) whether the candidates can be regarded as fulfilling the conditions laid down in Article 21, paragraph 1, of the Convention.
- ▶ If the Panel is satisfied that all candidates meet the selection conditions, its terms of reference require it to so inform the **government** without further comment. If some candidates are considered not to make the grade, the government will also be informed, with an indication of the reasons, and new candidates can be submitted.
- ▶ Once the list has been transmitted to the Assembly by the government, the Panel informs the Assembly of its opinion on candidates as communicated to the government.



The election process before the Parliamentary Assembly

- ▶ Governments should submit their list of candidates to the Assembly after having obtained the Panel's opinion on whether the candidates proposed fulfil the requirements under the Convention. The list is published on the Assembly's website.
- ▶ The Assembly will reject the list of candidates if the Panel has not been duly consulted.
- ▶ Candidates are first examined by the Assembly's specialist **Committee on the Election of Judges**.
- ▶ The committee has 22 members who are nominated by the political groups in the Assembly.
- ▶ Meetings of the committee are held in camera. Deliberations consist of three steps:
 - a briefing session;
 - a 30-minute interview with each candidate;
 - a discussion and a vote.
- ▶ A member of the Panel, usually the chair, is invited by the committee to attend the briefings, in order to explain the Panel's opinion and to reply to any questions.
- ▶ This **committee** votes on and communicates its preference to the plenary Assembly.
- ▶ Members of the **Assembly** vote on the candidates by secret ballot.

” Did you know?

- ▶ Around one third of judges at the European Court of Human Rights are women.
- ▶ All members of the Panel serve on a voluntary basis.
- ▶ The composition of the Panel must be geographically and gender balanced.
- ▶ Panel members are appointed for a three-year term, renewable once.
- ▶ Between July 2017 and May 2019, the Panel met four times and considered 36 candidates for appointment.
- ▶ In the same period, the lists of candidates were composed of 41% judges, 30% university professors, 19% practising lawyers and 8% others (for example, senior civil servants with a legal background).

This short guide is primarily aimed at those involved or professionally interested in the selection of candidates for election as Judge to the European Court of Human Rights. It contains information on the advisory panel's role and the criteria that the Panel uses for interpreting and applying the two generally worded qualifications required from candidates under Article 21, paragraph 1, of the European Convention on Human Rights.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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