On the Democratic Legitimacy of Europe’s Judges
A Principled and Comparative Reconstruction of the Selection Procedures

Armin von Bogdandy and Christoph Krenn

1. Introduction

For a long time the appointment of judges to international courts has been an issue for diplomats:brewed in ministerial corridors, decided behind closed doors, directed by the wisdom of national governments. At a time when international adjudication was rare and ‘blessed with benign neglect’, when international judicial decisions had little effect on our daily lives, on democratic institutions or social conflicts, executive wisdom and diplomatic skills could indeed be seen as the best way to choose those suited to populate such remote institutions.

Today the situation is different. International and supranational courts effectively impact on the world we live in. Among them the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) stand out. Being political achievements of a post-war Europe, they have

1 We are grateful to Markus Fyrnys, Matthias Goldmann, Jannika Jahn, Isabelle Ley, Karin Oellers-Frahm, Stefan Ruppert, Daniel Sarmiento, and Stephan Schill for valuable advice and critique.

Selecting Europe’s Judges. Michal Bobek.
© Oxford University Press 2015. Published 2015 by Oxford University Press.
developed in an unforeseeable manner into powerful institutions. Their judges empower citizens, restrain trade unions, define employment conditions, or determine child custody. In more conceptual terms these courts contribute to social interaction as multifunctional institutions and have thereby left the traditional understanding, which conceives of international courts only as dispute settlement bodies, far behind. Sure enough, the ECtHR and the CJEU resolve disputes—but they also stabilize normative expectations in reasserting the validity and enforcement of the law they apply. Moreover, they develop the law and thus create normative expectations, often called, even by the courts themselves, case law. Law-making through precedents is their business, too. Important social questions are framed and regulated by their decisions. Finally, they control and legitimate the authority exercised by others. Also in this respect, they resemble national constitutional or supreme courts. In performing those manifold functions the ECtHR’s and the CJEU’s authority is little determined by the law, so that judges shape the legal order according to their ideas and convictions. Although the courts have no direct coercive mechanisms at their hands, their authority is often hard to withstand. In other words, the ECtHR and the CJEU are multifunctional institutions that exercise public authority.

5 Hirst v UK (No. 2) App no 74025/01 (ECHR, 6 October 2005) (enhancing the political rights of prisoners).
8 Zaunegger v Germany App no 22028/04 (ECHR, 3 December 2009).
11 More in detail Marc Jacob, ‘Precedents: Lawmaking Through International Adjudication’ (2011) 12 German Law Journal 1005. This law-making happens although a decision is legally binding only upon thecontending parties in the litigated matter and has no further binding effect.
On the Democratic Legitimacy of Europe’s Judges

raises the question of their legitimacy, not least their democratic legitimacy, and prompts us to consider judicial selection to the Strasbourg and Luxembourg courts in a new light.

Nevertheless, many will wonder whether the selection of judges can be meaningfully construed as a democratic endeavour. Many perceive judicial appointments as rather technical and legally framed decisions, applying given criteria and aiming to select—out of a number of candidates—the best legal expert to fill a vacancy at a court. Such technical decisions primarily demand judgement, expertise, and assessment of past merits. Accordingly, they are often seen as ill-suited to be treated in the democratic process and rather to be left to specialized institutions like expert panels. To improve selection procedures, the argument goes, one should aim to ‘depoliticize’ rather than ‘democratize’ the process, putting it in the hands of independent experts and taking it off the diplomatic parquet. This position is prevalent in the discussion on appointing judges to the ECtHR and the CJEU.

However, if we zoom into the process’ actual working, the dominant view loses plausibility. The selection of judges to the ECtHR and the CJEU can hardly be squared with the notion of a decision predetermined by the respective treaties. Both the Convention and the EU Treaties paint only a very vague picture of the personalities of which a court bench should be composed. The Treaty on the Functioning of the European Union (TFEU) requires independence and professional expertise (Art 253 para 1 and Art 254 para 2 TFEU); the Convention speaks of candidates’ ‘high moral character’ and their juridical competence (Art 21 para 1 ECHR). This picture needs to be refined to be operable. Indeed, selection bodies for the ECtHR and the CJEU have done precisely this, giving very specific meaning to the notions of expertise and independence and developing additional criteria. Like norms, they have laid them down in general instruments, namely in resolutions, recommendations, and activity reports. The selection bodies do not only apply the law; they also engage in law-making.

A further doubt comes from comparison. If selecting judges were a mere technical exercise, one could hardly explain why many national constitutions assign the

In western modern normative thinking the paramount form of legitimacy for public authority is democratic legitimacy; Pierre Rosanvallon, La légitimité démocratique. Impartialité, reflexivité, proximité (Seuil 2008) 9; for the ‘post-national constellation’ see Jürgen Habermas, Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft in Philosophische Texte Band 4. Politische Theorie (Suhrkamp 2009) 402.

Contrast above ch 3 s 3.

See the discussion on the introduction of the expert panel involved in judicial selection for the EU courts set up by Article 255 TFEU: Final Report of the discussion circle on the Court of Justice in the European Convention CONV 636/03 (25 March 2003) para 6 and Ricardo Passos, ‘Le système juridictionnel de l’Union’ in Giuliano Amato, Hervé Bribosia, and Bruno de Witte (eds), Genèse et destinie de la Constitution européenne (Bruylant 2007) 565, 585; for such an argument as regards judicial selection in the ECtHR see for instance Christoph Grabenwarter and Katharina Pabel, Europäische Menschenrechtskonvention (5th edn, Beck 2012) 40.

This will be developed in detail below in s 3 of this chapter.

A notion we employ to describe not only legislative acts stricto sensu but also other, ‘softer’ forms of regulation and standard-setting. For a conceptualization of international soft law see Matthias Goldmann, ‘We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law’ (2012) 25 Leiden Journal of International Law 335.
selection of judges for constitutional courts to parliaments or involve members of parliament in judicial selection committees. This reveals that such decisions are of great importance for a political community. Since the ECtHR and the CJEU have a comparable impact, a technocratic take on selecting their judges is hardly convincing from a comparative perspective. The moment of selection of Europe’s judges is a moment to take a principled decision as to what kind of personalities should fashion court decisions which may deeply affect individuals, the further path of the law, and the courts’ institutional development and success.

To pre-empt misunderstandings: a reconstruction of the selection of judges in light of their democratic legitimacy is not a call for wholesale politicization. We do not advocate direct elections along the lines of the examples of the US or Bolivia. Nor do we understand judges as representatives. What we call for is, first, that representative institutions develop the criteria and procedures for becoming a judge in an open and co-operative fashion; and second, that these criteria are applied in a transparent and deliberative manner in concrete selection cases. This should also forestall concerns that the principle of democracy might negatively affect the independence of courts. To be clear, independence and impartiality are preconditions for the set-up and functioning of courts.

To substantiate our claim, we will first present the democratic principles of the Treaty on European Union (TEU) and the corresponding standards within the Council of Europe (section 2). They provide the basis for a comparative appraisal of the selection of judges to the ECtHR and the CJEU. Section 3 assesses the respective selection procedures. Three theses will guide our contribution: first, in the European Union, when it comes to selecting CJEU judges, reality lags behind the democratic project laid out in Articles 9 to 12 TEU; second, when comparing the judicial selection process in the EU and the Council of Europe the latter fares

---

21 See Art 94 German Basic Law; Art 147 Constitution of Austria; Art 135 Constitution of Italy; Art 194 Constitution of Poland; Art 159 Constitution of Spain; Art II 2 (2) US Constitution. In detail, Andreas Voßkuhle, Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG (Beck 1993) 47–50, 63–4. It is a peculiarity of the appointment of the highest court judges that the number of cases is so few that parliamentary bodies can potentially handle them with all the case-specific factual assessments involved; on the benefits of developing the law, inspired by concrete cases, see Christoph Schönberger, ‘Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen’ in Grundsatzfragen der Rechtssetzung und Rechtsfindung. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol 71 (De Gruyter 2012) 296, 312–13.

22 See for instance Art 95 para 2 German Basic Law; Article 197 and 187 Constitution of Poland; Section 178 Constitution of South Africa.

23 On the ECtHR see only Mikael Rask Madsen, ‘The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence’ in Jonas Christoffersen and Mikael Rask Madsen (eds), The European Court of Human Rights between Law and Politics (Oxford University Press 2013) 43, 48.


25 Von Bogdandy and Venzke, In wessen Namen? (n 14) 204.
far better; however, third, the Council of Europe institutions’ lack of respect for the very law they have developed is deeply problematic from a democratic perspective.

2. Concurring Democratic Principles in the EU and the Council of Europe

This section develops the concurring democratic principles in EU law and the law of the Council of Europe that will, in a second step, be applied to the selection procedures in the following section 3. To be sure, this is not about developing principles that carry claims of illegality, holding certain rules or practices illegal. We are here concerned with guiding principles that legally justify a doctrinal reconstruction and proposals for reform.

In the EU, where the transformative and intrusive effects of public authority beyond the state have been most visible and articulated, the development of democratic principles has progressed furthest. For more than 20 years efforts have gone into carving out legitimating models, strategies, and venues to justify the operation of EU institutions. They resulted in Articles 9 to 12 TEU, the Union’s ‘democratic principles’. Inserted by the Treaty of Lisbon into primary law, they frame the Union based upon representative, responsive, deliberative, and transparent institutions. These articles have been elaborated in one of the most involved political processes that the European continent has ever seen, and its enactment has gone through very burdensome procedures, mostly constitutional amendment procedures. They have also been the object of detailed judicial review. Accordingly, there is much to be said for the view that the concept of democracy as laid down in these articles enjoys the consent of the vast majority of European citizens. Given their wording and systematic outlook, they apply to all EU institutions, including the CJEU.

The Council of Europe cannot claim to have a similar set of inclusively elaborated democratic principles. Nonetheless, its democratic commitment is prominently laid down in its Statute. The Council’s founding document refers to its

---


28 Art 10 TEU speaks generally of ‘the Union’ which shall, according to Article 9 TEU, be democratic ‘in all its activities’. A differentiation as regards the respective institutions only happens in Art 13 TEU (emphasis added).
devotion to democracy. Safeguarding and realizing democratic ideals and principles is among the Council’s aims. It is acknowledged that the Council itself is bound to respect the democratic standards it was set up to safeguard; however, given the lack of a catalogue of democratic principles, one may wonder what these precise standards are. As will be shown in a minute, very much like in the EU, the ideas of representation, transparency, and deliberation are of crucial importance. This can be discerned from the Council’s institutional law and a number of its secondary legal instruments. It should have become clear by now that our assessment of selection procedures is not a free-standing exercise but strives to take seriously the legal commitment of the EU and the Council of Europe to democratic principles.

2.1. Representative democracy

The member states conceive of themselves as representative democracies; therefore, in many domestic contexts, parliaments have a say in the selection of judges to constitutional or other important courts. Because such judicial appointments are deemed important and contingent, it is for representatives of the community to choose who is best suited to sit on these courts. Article 10 TEU also founds the EU on representative democracy. However, it adapts this principle, quite remarkably, for the supranational realm. Its second paragraph installs two lines of democratic legitimation that form the basis for a composite and multilevel democratic structure: European citizens are represented in the European Parliament, which they elect by direct and universal suffrage. The member states’ democratically organised peoples in turn are represented in the European Council and the Council composed of national executives. The latter are accountable to member states’ parliaments or directly to member state citizens. The key role of national parliaments is further accentuated by Article 12 TEU, which assigns to these assemblies a significant position in shaping and controlling EU politics.

29 See Recital 2 Preamble of the Statute of the Council of Europe (5 May 1949) 87 UNTS 103, ETS 1.
30 Art 1 of its Statute (n 29); the effective implementation of its aims are of such importance to the organization that it foresees a mechanism that can, in extreme cases, lead to the exclusion of a member state seriously impairing the Council’s aims; see Art 8 CoE Statute; in the EU it took until the 1997 Amsterdam Treaty to emphasize its commitment to common principles in a similar manner, drawing up a comparable mechanism, now enshrined in Art 7 TEU.
31 See Council of Europe (Committee of Ministers), ‘Access to Council of Europe documents’ (12 June 2001) CM Res 2001/6: ‘Convinced that the application by the Council of Europe of the principles and standards which it lays down for its member states is a fundamental element of the Organisation’s credibility and consistency.’
32 See nn 21–2.
are today not only member state nationals, but also members of a bigger political community.\textsuperscript{34} Such a multilevel structure for democratic governance demands we conceive selecting judges to be a \textit{shared responsibility}.

Also, the Council of Europe’s main organs, the Committee of Ministers and the Parliamentary Assembly (PACE), are composed of ‘representatives’, as the Council’s Statute informs us.\textsuperscript{35} The law hence points to these institutions when we query the institutional locus of politics in this organization. The Committee of Ministers is composed of foreign ministers or high-ranking national diplomats;\textsuperscript{36} the PACE unites members of parliament sent by their national parliaments.\textsuperscript{37} Like the EU,\textsuperscript{38} the Council of Europe has seen a certain pull toward strengthening its parliamentary component. Early on, the PACE programmatically changed its name from ‘consultative’ to ‘parliamentary’ assembly, making ample use of those competences granted to it, one particular example being the election of judges. Albeit not directly elected, it represents citizens’ interests from a transnational perspective.\textsuperscript{39} A lot speaks therefore in favour of also understanding the PACE as an institution entrusted with democratic representation.

Of course, there are important differences from the European Parliament: whereas the PACE follows the path of international parliamentarism, ie the collaboration between national parliamentarians, the EU parliament represents a new polity. This difference, however, does not affect our point: that both institutions serve the function of democratic representation beyond the state.

\subsection*{2.2. Transparency, participation, and deliberation}

To be sure, representative democratic processes are difficult to reproduce beyond the state.\textsuperscript{40} Most importantly, supra- and international parliamentary assemblies are little embedded in public discourses. This speaks for the significant involvement of national parliaments, as laid down in Article 12 TEU. Beyond this, it has prompted many to investigate the actual processes of decision-making. In the EU, important scholarship focuses on the promise of deliberative settings to enhance the legitimacy of EU governance.\textsuperscript{41} The question how a decision is rendered moves

\begin{thebibliography}{9}
\bibitem{CoEStatute} Articles 14 and 25 of the \textit{CoE Statute} (n 29).
\bibitem{CoEStatute15} See Article 15 of the \textit{CoE Statute} (n 29).
\bibitem{CoEStatute25a} See Article 25a of the \textit{CoE Statute} (n 29).
\bibitem{Ley2015} Isabelle Ley, \textit{Opposition im Völkerrecht. Ein Beitrag zu den legitimationstheoretischen Grundlagen internationaler Rechtsentwicklung und ihrer Anwendung} (Springer 2015) 232–6 (showing that decisions in the assembly can be explained along both, political and national lines).
\bibitem{Habermas2004} Jürgen Habermas, \textit{Der gespaltene Westen} (Suhrkamp 2004) 137–42.
\end{thebibliography}
to the foreground. Put pointedly: even more so than their domestic counterparts, public institutions beyond the state have to earn democratic legitimacy.

This insight has found its way into the EU Treaties and is reflected in Article 11 TEU. This provision demands that decisions be taken as openly as possible, that venues for participation are opened, and that deliberation be the dominant decision-making paradigm. The integration of diverse views and their open and deliberative processing can inform decisions in many ways. Transparency allows the relevant knowledge for active engagement. The comprehensibility and the possibility of attributing accountability is a democratic essential, in particular in a complex multilevel system. Accordingly, the CJEU unequivocally holds in its recent case law that transparency in EU law has a pronounced democratic meaning and establishes a presumption of democratic openness that needs to be rebutted by institutions which seek confidentiality. Participation, deliberation, and transparency are important elements of democratic governance in the EU.

Similar democratic principles can be found in the Council of Europe, though directed more toward state behaviour than toward the authority of the Council itself. Nevertheless, an acknowledgement of the value of deliberative and participatory governance can, for instance, be discerned in rules of the Committee of Ministers that institutionalize consultations of and discussions with other institutions and experts. As regards transparency, the Council of Europe’s 2009 Convention on Access to Official Documents sets the tone by stressing the ‘importance in a pluralistic, democratic society of transparency of public authorities’. From a democratic perspective, this must also comprise supranational and international public authorities. Accordingly, the Council does not confine itself to setting up standards for its contracting states; it also commits itself to transparency and openness, establishing that for its own work, ‘transparency is the rule and confidentiality the exception’.

No. 2006/20; see also Erik O Eriksen, The Unfinished Democratization of Europe (Oxford University Press 2009).

43 See also Art 1 para 2 TEU and Article 15 TFEU.
46 See however, CM Res 2001/6 (n 30).
3. Judicial Selection for the ECtHR and the CJEU: A Democratic Reconstruction

Democratic principles are not operative by themselves, but need concrete procedures and practices. These need to be reconstructed if we want to appraise the democratic quality of the selection of judges for the ECtHR and the CJEU. This will be done on the following pages. In our analysis we will distinguish between the development of criteria for the selection of judges (3.1) and the actual selection process (3.2). We hence discuss first how abstract criteria on what makes a good judge are developed; only then, in a second step, will we discuss how individual candidates are picked. Certainly, in practice the two questions are intertwined. For an analysis guided by a democratic perspective it is, however, useful to distinguish between general and open norm development and norm application in concrete cases.51

Before starting the comparative endeavour a possible objection should be addressed, namely the comparability of judicial selection in the CJEU and the ECtHR. Certainly, the two courts and their judges differ in important respects. In Strasbourg judges have to interpret and apply a catalogue of human rights; in Luxembourg this covers just a small percentage of a judge’s job description. More importantly, the Luxembourg judge sits on a court that is part of the judiciary of an autonomous and fully developed legal order, where her judgments have, in particular through the preliminary reference procedure, immediate effects in national law. Against this backdrop, what justifies our comparison? It is the fact that both courts exercise public authority in the European legal area and thereby contribute to shaping it. The diverging exigencies and challenges for judges in both systems have to be taken into account when selecting—but this very process can be reconstructed in light of democratic principles and, on this basis, can be compared.

3.1. Laying down the standards

In the EU and the Council of Europe alike, the crude criteria for the selection of judges set out in the Treaties and the Convention respectively are specified—albeit in markedly different ways. In Strasbourg the PACE is the driving force, interacting with national governments, the Committee of Ministers, and the ECtHR. It has set up a number of criteria in what can be denoted as a deliberative and open procedure, creating the kind of democratic noise often lacking in international politics, and has thereby addressed crucial but contested issues (section 3.1.1). While there is lively noise in Strasbourg, an eerie silence persists in Brussels when it comes to debating what constitutes a good judge. Here, the Article 255 Panel has taken the lead, presenting, in activity reports, a number of criteria it deems

important. In these reports, political choices have been couched in terms of expertise (section 3.1.2).

3.1.1. Noise and co-operation in Strasbourg: international parliamentarism in action

The selection of judges is one of the PACE’s most visible and prominent competences. From the mid-1990s it has taken an active role in shaping the selection process. It has set a number of political priorities: core themes include the improvement of national selection procedures, the language proficiency of judges at the court, as well as the goal to raise the proportion of female judges at the ECtHR to at least 40 per cent. In an array of law-making documents, namely recommendations, resolutions, and reports, the PACE has painted a clear picture of what kind of person it believes a European judge shall be and on which bench she shall sit. It is of a judge who is not only competent but also communicative; who has an understanding of people and society, courtesy, and humanity and a commitment to public service. She sits on a bench that is gender-balanced and multilingual.

Whether all of these criteria are convincing can be debated. However, what is initially interesting from our perspective is the process through which this profile was devised. A good case in point is the development of a specific subset of criteria, namely those concerned with a gender-balanced bench. To achieve this latter end the PACE demanded that national lists be ‘mixed’ unless the list contains only candidates of the underrepresented sex or if exceptional circumstances exist. This concern has been subject to intensive parliamentary debate, with the PACE’s stance on the matter being subject to open contestation and reconsideration. On the one hand the PACE reacted to the lack of progress it observed in the contracting states; on the other it engaged in an intensive exchange with the Committee of Ministers and national governments.

Early on, the PACE’s broader views on the importance of gender balance at the court had, in principle, been accepted and reinforced by the Committee of

52 A number of procedural adjustments aim at increasing the depth and objectivity of the factual basis for the Assembly’s decision. This includes standardized curricula vitae and personal interviews to be conducted by one of the Assembly’s Sub-Committees. They were introduced in PACE Resolution 1082 (1996), then again debated after first experiences and refined in PACE Resolution 1200 (1999). Further see above ch 5 s 3.1.

53 For a good overview of all the reforms initiated by the PACE see the report prepared by its Committee on Legal Affairs and Human Rights, AS/Jur/Inf (2012) 02 rev4 (7 December 2012).

54 For a list of personal qualifications the Assembly considers in its interviews see PACE, Report of the Committee on Legal Affairs and Human Rights, Doc 9963 (7 October 2003), para 56.


56 PACE Resolution 1366 (2004), subsequently modified by Resolution 1426 (2005), Resolution 1627 (2008), and Resolution 1841 (2011).


58 As to the details, the Committee of Ministers has always insisted on the possibility of exceptions to mixed lists.
Ministers. Nevertheless, in practice, the mixed-lists approach had been subject to challenge. During the Maltese selection process in 2006 the government of Malta did not provide a mixed list, claiming difficulties after having issued public calls for candidature which nevertheless did not lead to qualified female candidates applying. The PACE insisted on a mixed list. Malta claimed that the PACE had no competence to reject its list since Article 21 ECHR, regulating the criteria for becoming a ECtHR judge, was silent on the issue of gender balance.

The ECtHR rendered an advisory opinion to help overcome the disagreement. Its approach is remarkable. The Court took 20 of the total 30 pages of its opinion to develop the procedural history of the dispute. It highlighted the host of discussions in the Assembly and the agreement with the Committee of Ministers on the importance of gender balance. Moreover, it embedded the issue in a broad comparative analysis of international and contracting state highest court practice, documenting a movement toward gender-balanced benches. In light of this record, the Court did not push its own concept of gender-balanced benches but called for possible exceptions where all appropriate steps had been taken to find female candidates, in particular if open calls for candidature had been issued. The PACE reacted to the Court's opinion by revising its procedure and establishing that unusual circumstances that allow deviation from the mixed-lists rule can be established by a two-thirds majority in the PACE's responsible Sub-Committee.

The PACE therefore strengthened the legitimatory basis of its proposals by reaching basic agreement with the Council of Europe's 'second chamber', the Committee of Ministers, by engaging with the legal assessment of the ECtHR, and by showing responsiveness to national stakeholders. This co-operative, multilevel, and deliberative outlook is convincing in light of democratic principles. What is more, the figures suggest that such a democratic strategy is apt to contribute to good results. Today, out of 47 judges, 18 are female—a quota of 38 per cent, which is in sharp contrast to 19 per cent at the CJEU.

The process of defining what constitutes a good judge in the Council of Europe has allowed inclusive articulation of criteria that are politically sensitive and potentially controversial. Another important procedural innovation can be read in this light: the PACE arguably had the necessary political weight to be able to increase—together with the Committee of Ministers—pressure on national governments to lift the quality of their procedures to set up candidate lists: a potentially thorny but important issue, given the shared responsibility of national and transnational actors for selecting Europe's judges.

60 ECtHR Grand Chamber, Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (12 February 2008).
61 Advisory Opinion (n 60) paras 34–5 and 49.
63 At the Court of Justice, of 37 judges and advocate generals, only seven are women. At the General Court the situation is only slightly better. Of 28 judges, six are women, which corresponds to 21 per cent female judges (as of 1 August 2014).
As it is, according to Article 22 ECHR, the PACE selects a candidate from a list of three drawn up by the national government. In this context, the PACE has developed the practice to accept the lists drawn up by the national governments and to choose among the candidates proposed if certain procedural criteria are fulfilled: national selection processes have to ‘reflect the principles of democratic procedure, transparency and non-discrimination’. The formulation of these conditions can be solidly based on the idea that the national and international components of the selection process cannot be strictly separated, that the outcome’s legitimacy results from the supplemental working of national and transnational institutions. Equal treatment, transparency, and democracy are anchored in the national laws of contracting states and the Convention, providing a common framework that guides and contains the exercise of public authority. The PACE does not impose substantive criteria for the composition of candidate lists, nor does it spell out national selection procedures en détail. Rather, it aims to secure the legitimacy of domestic selection procedures and to thereby activate the potential of a complex legitimatory mechanism.

3.1.2. Silence and solitude in Brussels: experts in charge

The situation is different in the European Union. The central visible actor in the process is the recently established Article 255 Panel. Its primary task is to prepare the final selection decision of the ‘representatives of the governments of the Member States’ by rendering opinions—not disclosed to the public—on

64 PACE Resolution 1646 (2009), para 2. See already PACE Recommendation 1649 (2004). This can mean, for instance, public and open calls for candidatures and the consultation of national parliaments. This has been supported by the Committee of Ministers; see CM (2012) 40 final (29 March 2012).

65 This is reflected, most visibly, in PACE Resolution 1646 (2009) para 1: ‘[The Assembly] underlines the importance of appropriate national selection procedures in order to ensure and reinforce the quality, efficacy and authority of the Court.’ See also earlier Recommendation 1429 (1999).

66 For the principle of democracy see the ECHR’s Preamble: ‘fundamental freedoms […] are best maintained […] by an effective political democracy.’ The ECtHR moreover reads Articles 10 (freedom of expression) and 11 ECHR (freedom of association) as prerequisites for the functioning of democracy, for example in Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) para 42 (as regards Article 10) and in United Communist Party v Turkey App no 133/1996/752/951 (ECtHR, 30 January 1998) para 25 (as regards Art 11). For the principle of non-discrimination see Art 14 ECHR and the general non-discrimination provision in Art 1 of the 12th Additional Protocol, entered into force in 2005.


68 The PACE is quite successful. The German Federal Ministry of Justice, for instance, issued public calls for candidacy for the nomination of the German judge to the ECtHR for the first time in 2010; the UK has done this since 1998: on this see Henry G Schermers, ‘Election of Judges to the European Court of Human Rights’ (1998) 23 EL Rev 568, 574.


70 In contrast to appointments to the executive board of the European Central Bank (Art 283 para 2 TFEU) or the Court of Auditors (Art 286 para 2 TFEU), which are carried out by the EU
candidates' qualifications. In three activity reports, it has presented a number of criteria it deems relevant when judging applicants. The 255 Panel is composed of seven experts, mainly national and former EU judges, one of which is proposed by the European Parliament.

To be sure, its establishment constitutes a significant improvement of the selection process. The integration of expertise-based elements is meaningful to thoroughly assess candidates' professional credentials. However, from the perspective of democratic principles the role of experts should be narrowly tailored, in particular as regards further specifying selection criteria and procedures. This does not only derive from Article 10 TEU that privileges democratically representative institutions to discuss issues of principle; it also follows from the 255 Panel's procedure: it neither holds public meetings, nor is it obliged to provide reasons that can publicly be discussed. Moreover, these experts are themselves selected by a judicial expert, accounting for a critical element of co-optation in the procedure: it is for the president of the CJEU to present a proposal for the Panel's composition, which the governments of the member states so far have followed.

In fact, the 255 Panel itself has recognized that its role must be a limited one. It stresses, for instance, that it is not entrusted to deal with the composition of the Court. Questions of social representativeness or gender balance are beyond its mission. This sort of self-restraint is double-edged: on the one hand, it is to be welcomed in light of the Panel's limited democratic legitimacy; on the other hand it is regrettable that important political issues are not brought to the fore, but are nevertheless decided. The 255 Panel cannot help but make important political choices. To give an example: when reviewing professional experience, one of the six criteria which the Panel relies on, it has underlined the particular importance it attaches to candidates' views on the 'nature, role and scope of the office of Judge or Advocate-General'. This suggests that the Committee should assess candidates' professional convictions. Here, highly diverse views on the role of a judge may

---

71 This point will be developed further: see text to n 110 et seqs.
74 Ibid. Arts 7 and 8.
75 Art 255 para 2 TFEU.
76 The grounds on which the president bases his decision and who are potential souffleurs is unclear. It has been suggested that in the context of the first round of Panel appointments, President Skouris was heavily lobbied; see above ch 1 s 2.
79 The other five are legal expertise, the ability to perform the duties of judge, independence and impartiality, language skills, and the ability to work in an international environment.
exist: a judge may see her task as purely cognitive act\textsuperscript{81} or as creative legal work;\textsuperscript{82} she may be sceptical of a \textit{gouvernement des juges}\textsuperscript{83} or support judge-driven integration;\textsuperscript{84} moreover, she may see the Union as a new federal polity or merely an instrument for international co-operation; she may conceive member state governments or EU citizens as the normative vanishing point for the judicial decision.\textsuperscript{85} These are possible understandings that inform different yet legitimate conceptions of the ‘nature, role and scope of the office of Judge or Advocate-General’. Openly discussing them neither gears toward equating judges to politicians,\textsuperscript{86} nor should be seen as impairing the independence of the judiciary.\textsuperscript{87} Basic convictions and assumptions necessarily flow into a court’s jurisprudence.\textsuperscript{88} This is, hence, not to blame the Panel’s work. Rather than criticizing the Panel, we observe it to be in a double dilemma: it rightfully refrains from addressing manifestly political questions. However, like anyone pondering what constitutes a good judge, it cannot help but make important value judgements, which it needs to hide under the guise of expertise. Another, similarly important point is the composition of the Court. Although officially beyond the mission of the 255 Panel, it could be suggested that under the Panel’s auspices, candidates with a profile comparable to that of many Panel members—namely that of the domestic judge—may be more successful than academics or diplomats in finding their way onto the CJEU’s bench.\textsuperscript{89} Certainly, all this would raise less concern were the political process to fully review the Panel’s evaluation: giving political orientation where it is deemed necessary and re-evaluating political choices made by the experts. According to Articles 253 and 254 TFEU, this is the task of the governments of the member states.

\textsuperscript{81} See such an understanding promoted by the German judge at the CJEU, Thomas von Danwitz, ‘Funktionsbedingungen der Rechtsprechung des Europäischen Gerichtshofes’ (2008) 43 Europarecht 769, 769–770.
\textsuperscript{82} G Federico Mancini and David T Keeling, ‘Democracy and the European Court of Justice’ (1994) 57 Modern Law Review 175, 186 (arguing that CJEU judges are held to implement the ‘preference for Europe’ enshrined in the Treaties).
\textsuperscript{86} See Christoph Möllers, ‘Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts’ in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, and Christoph Schönberger (eds), \textit{Das entgrenzte Gericht} (Suhrkamp 2011) 281, 314–318 (making the case against equating highest courts to small-scale parliaments even if the election of judges is highly politicized).
\textsuperscript{87} Here, other issues are pertinent, such as the possibility of renewing the term in office pursuant to Arts 253 para 4 and 254 para 2 TFEU, which is problematic for the independence of CJEU judges. The Council of Europe recently changed the term for ECtHR judges to a non-renewable nine years; see Protocol no 14 entered into force on 1 June 2010.
They literally have the final word. The judicial selection process in the EU is—quite anachronistically—exempted from judicial review.

Unfortunately, it is hard to tell how the member states perceive and exercise their role. They neither issue reasoned statements on judicial selections nor open discussions to the public. The institutional dynamics of EU judicial selections nevertheless speak for a tempered role of the other member states. Before the 255 Panel was established, member states had given the green light to every single candidate proposed by another member state. The Panel’s introduction can be seen as a direct answer to this practice of diplomatic courtesy and the perceived lack of critical assessment. Against this backdrop, governments of the member states may well feel obliged to follow the Panel’s lead. With a slight hint of satisfaction, the latter revealed in its Third Activity Report that all its opinions, including seven which had been unfavourable, had been followed by the governments of the member states. The context of the Panel’s establishment has created high argumentative and reputational hurdles to depart from its judgement. It has led to the process of selecting Europe’s judges being framed as a technocratic exercise. This does not correspond to the true nature of appointing CJEU judges. Moreover, it does not allow disappointment with the Panel’s selection criteria to be formulated in reasoned political form. Important issues such as the composition of the CJEU that would warrant political discussion have in the EU no forum to be addressed in.

An improvement in light of democratic principles could be the involvement of the European Parliament, which has, since the 1984 Spinelli report, longed for a role in appointing European judges. This step corresponds to the legitimatory logic
of Article 10 TEU, it also appears to be the most promising way to increase the discursive quality of the process and raise public awareness—not least for the CJEU’s work in general. It would be possible to involve the European Parliament without amending the Treaties. It could act in the form of resolutions and elaborate, even with the help of the 255 Panel, principled criteria for the selection of judges. Such active engagement of the European Parliament would arguably steer discussion and incite the governments of the member states to reflect upon and justify their work and take a more active role in the process.

3.2. Applying the law

Certainly, not every appointment must lead to broad, principled discussions on the traits of a good judge. Some cases may incite engagement in general debates and reconsideration of past decisions, others may not. When it comes to applying those criteria that have been carved out before, the focus rests first and foremost on gathering and thoroughly assessing information on individual candidates. Here, the emphasis on expertise and objective assessments is well placed. Nevertheless, this stage is also important from the viewpoint of democratic principles. Three issues are particularly pertinent: the proposal of candidates by national governments (3.2.1), the involvement of expert panels (3.2.2), and the actual decision (3.2.3).

3.2.1. Proposing candidates

In both regimes the procedure kicks in with the proposal of candidates by a member state. This moment is decisive for the whole process; deficits can hardly be compensated later. National authorities therefore have a huge responsibility. Open

98 The lack of EP involvement is, moreover, striking from a systematic perspective: appointments to other independent institutions like the European Central Bank or the Court of Auditors include at least a consultative role for the EP; see Art 283 para 2 and Art 286 para 2 TFEU.
99 Renaud Dehousse, The European Court of Justice. The Politics of Judicial Integration (Macmillan 1998) 14 (linking the diplomatic, sheltered character of judicial appointments to the CJEU to the lack of controversy surrounding the Court’s legal work).
100 See Rule 120 of the European Parliament’s Rules of Procedure.
101 Arts 5, 7, and 8 of Council Decision 2010/124/EU (n 70) Annex would have to be adapted in conformance.
102 Arguably a slight shift in such direction can already be discerned. Early after the establishment of the 255 Panel, one finds in appointment decisions the formula: ‘The panel set up by Article 255 of the Treaty on the Functioning of the European Union has given a favourable opinion on the suitability of […]’; see for instance Council of the EU, ‘Decision of the representatives of the governments of the Member States appointing a Judge to the Court of Justice’ (31 May 2010) Doc 9720/10. Surprisingly, in later decisions, the word favourable has silently disappeared, referring now only to the ‘opinion’ of the Panel. Now the formula reads: ‘The panel set up under Article 255 TFEU has given an opinion on the suitability of…’ see for instance, Council of the EU, ‘Decision of the representatives of the governments of the Member States appointing a Judge to the General Court’ (16 October 2013) Doc 14468/13. This semantic nuance could be read as a hint that the governments of the member states are not blindly following the Article 255 Panel.
103 See the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights (Izmir, Turkey, 26–7 April 2011); PACE Resolution 1646/2009 (‘In the
calls for application and transparent, reasoned selection could help find qualified candidates. The involvement of national parliaments could improve transparency and the public visibility of the processes. Here, much needs to improve in both systems. What differs, however, is the lever employed: while the PACE has openly stated that it would reject lists if the national process does not conform with a number of basic principles, such a stance cannot be observed in the EU. It appears from the Panel’s activity reports that it conceives the national and supranational elements of the selection process as two separate and detached spheres. In the 255 Panel’s conception, a candidate who emerges from a deficient, if not corrupt, national pre-selection can proceed to the CJEU’s bench under the sole condition that she conforms with the Panel’s substantive criteria. This means the fact that deficient national pre-selection might have excluded a host of excellent candidates is, according to the Panel, none of its business. It even goes so far as to set the national pre-selection of judges outside the scope of EU law, an argument which is utterly unconvincing in light of the composite structure of European governance framed by common principles. The PACE on the other hand underlines the shared responsibility of national and transnational institutions by insisting on shared principles for the selection. Only if these principles have been respected by all involved can the whole process claim to have been legitimate.

The composite nature of the selection process has moreover implications for the number of candidates proposed. In the EU, where only one candidate is presented, her rejection involves high reputational costs for all actors involved, including the candidate herself. A list of at least three candidates, as practised in Council of Europe selection procedures, appears preferable. This can be easily achieved in the EU: nothing in the text of the relevant provisions, namely Articles 253 and 254 TFEU, regulates how many candidates national governments initially nominate.

3.2.2. Involving experts

A second important element shared by both systems is the involvement of expert panels. Recently, the Council of Europe has come up with its own ‘panel of seven’, absence of a real choice among the candidates submitted by a State Party to the Convention, the Assembly shall reject lists submitted to it’).

104 The Austrian Constitution provides a promising solution that potentially increases transparency and deliberation: according to Art 23c paras 1 and 2 Federal Constitution, the federal government has to reach agreement with parliament’s main committee in nominating a candidate. In practice, however, the main committee does not discuss several applications but merely rubber-stamps the candidate proposed by the government. For the opposition’s critique on the occasion of judge Kreuschitz’ nomination to the General Court see <http://www.parlament.gv.at/PAKT/PR/JAHR_2013/PK0067> (last checked: 15 November 2014).


107 Ibid. The Article 255 Panel holds that it is ‘aware that the selection procedure is the sole responsibility of the Member States and is not framed by the TFEU’.

108 See only Art 2 TEU.
informally named after its first president, Luzius Wildhaber, to advise governments on the suitability of their candidates before a proposal is made to the PACE. The inclusion of experts into the selection procedure is valuable, also from a democratic perspective. Certainly, it cannot be their task to define broad general criteria nor to make ultimate decisions; rather, they should apply the criteria spelled out in the political process and inform decision-makers’ choices. In general, due to their personal and professional experience, they are in a unique position to gather information, structure it, and assess it for instance as regards the legal expertise, independence, and impartiality of candidates. Legal technique and knowledge gained in a professional environment and demonstrated in practice and academia is important for any judge to professionally perform her function, but also for the trust invested in the—compared to national courts—young and fragile institutions of which they are part.

What is critical in regard to the assessment produced by these panels is how it is subsequently processed. It is essential that the grounds revealed by experts are presented to all decision-makers to enrich their deliberations. Moreover, citizens should be able to understand the bases on which judges were selected. To enable transparency, accountability, and public debate, expert opinions as well as the leading grounds of selection decisions should be made public, having due regard to legitimate privacy interests. Publicness is not to put—as a matter of principle—candidates under the spotlight. However, if selection bodies treat candidates fairly and respectfully, someone inclined to seek highest judicial office, who has a passion for the cause, should have the stomach and ability to stand a certain degree of public scrutiny. It may well even be in candidates’ own interest. In this regard there remains much to be done in the Council of Europe and the EU. However, the transparency already in place in the Council of Europe has led to a number of occasions on which newspapers or

---

110 In this respect the tendency of the Wildhaber Committee to borrow from the criteria proposed by the EU’s 255 Panel instead of seeking orientation from the Parliamentary Assembly is rather alarming.
112 See the Draft 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, GT-GDR-E(2013)R2 Addendum II (19 September 2013).
113 Publicness is not to put—as a matter of principle—candidates under the spotlight. However, if selection bodies treat candidates fairly and respectfully, someone inclined to seek highest judicial office, who has a passion for the cause, should have the stomach and ability to stand a certain degree of public scrutiny. It may well even be in candidates’ own interest. In this regard there remains much to be done in the Council of Europe and the EU. However, the transparency already in place in the Council of Europe has led to a number of occasions on which newspapers or
members of parliament revealed information that brought about the withdrawal of unsuited candidates.\textsuperscript{116} Certainly, often a delicate balance has to be struck; nevertheless, it is beyond doubt that more transparency is needed.\textsuperscript{117}

3.2.3. Deciding

So far, we have focused on developing criteria for selecting judges and on the procedures for their application. This should not lead, however, to overlooking the actual moment of decision. In a publicly rendered decision, the endpoint of the process crystalizes. It should assure the procedure's legitimate course and is the instance which public scrutiny can most easily attach to and new discussions be sparked. This is facilitated by an open vote, as foreseen in the law of the Council of Europe.

4. Conclusion

Today, democracy is an imposing principle for the selection of Europe's judges. In light of their public authority, the selection of ECtHR and CJEU judges needs to be reconstructed and lived as a democratic process. What this demands can be derived from the concurring democratic principles in the TEU and the law of the Council of Europe, which provide criteria for the selection procedures and show the shared responsibility of national and transnational institutions. The legal framework in the Council of Europe is, against this backdrop, much more convincing than the one elaborated for the selection of EU judges. Much can be said for the point that the Council of Europe conceptually leads the way when it comes to selecting Europe’s judges. Accordingly, the EU should take the Council of Europe as an example—but only as regards its law, not its practice. The best procedures and standards are of little value if they are not lived by. In this regard, in Strasbourg, huge problems persist.\textsuperscript{118} The Council of Europe institutions and the member states have to respect the laws which they themselves have set up. Otherwise, what we call democracy turns out to be a travesty.


\textsuperscript{117} In the Council of Europe important steps are taken to develop the Wildhaber Panel in this sense, seeking to establish a fruitful relationship with the Parliamentary Assembly; see the Draft CDDH report (n 112).

\textsuperscript{118} See the critical analyses above in ch 6 of this volume as well as in Engel (n 116).