"High Judicial Office" and "Jurisconsult of Recognised Competence": Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court

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I. Introduction

The qualifications required for judges of the European Court of Human Rights (ECtHR) ("the Court") are defined in Art. 21 of the European Convention on Human Rights (ECHR) ("the Convention"). The basic provision on their election is Art. 22. According to its first paragraph the judges are elected by the Parliamentary Assembly of the Council of Europe "from a list of three candidates nominated by the High Contracting Party".

The procedure of election of judges has undergone important changes in the last decade.[1] National procedures for selecting candidates have been improved based on recommendations by the Committee of Ministers and the

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[1] See e.g. CDDDH (Steering Committee for Human Rights) report on the longer-term future of the European Convention on Human Rights, CDDH(2015)R84, Addendum 1, paras. 100-106.

Parliamentary Assembly, and the procedures in the Assembly have evolved. Thus the sub-committee of the Assembly's Committee on Legal Affairs and Human Rights, which since 1998 has conducted interviews with the candidates, was replaced in 2014 by a permanent Parliamentary Assembly Committee on the Election of Judges.[2]

Before that, in 2010, a new body, the Advisory Panel of Experts on Candidates for Election as judge to the European Court of Human Rights ("the Advisory Panel") had been set up.[3] This step can be seen as a measure strengthening the election procedure: it adds an element of independent judicial expertise to the system characterised by the democratic legitimacy derived from the role of the Parliamentary Assembly, as the method of electing judges affects the appearance of their independence.[4]

The task of the Advisory Panel is, however, and above all, to give additional guarantees that the judges elected by the Parliamentary Assembly really meet all the requirements set out in the above-mentioned Art. 21 of the Convention.

The purpose of this paper is to analyse and to interpret those requirements especially in light of the Advisory Panel's practice.[5]

II. Article 21 of the Convention: General Remarks

According to Art. 21(1) of the European Convention on Human Rights, the judges of the European Court of Human Rights

> "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".

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[2] Resolution 1842 (2011) adopted on 7.10.2011, as modified by Resolution 2002 (2014): "[...] 9. [...] the Assembly decides to create a general committee on the election of judges to the European Court of Human Rights, whose terms of reference are appended hereto [...]".

[3] Committtee of Ministers' Resolution CM/Res(2010) 26 adopted on 10.11.2010; see *N. P. Engel*, Mehr Transparenz für die Wahrung professioneller Qualität bei den Richter-Wahlen zum EGMR, EuGRZ 39 (2012), 486 et seq. See also the reports mentioned below in note 6.

[4] See *I. Benizri*, "Justice Must Not Only Be Done, It Must Also Appear to Be Done": Selecting Judges of the Court of Justice, C.D.E. 51 (2015), 365 et seq. (372 et seq.). On democratic legitimacy in this context, see *A. von Bogdandy/C. Krenn*, Zur demokratischen Legitimation von Europas Richtern, JZ 11(2014), 529 et seq.

[5] Both authors have been members of the Panel, *Matti Pellonpää* between 2010 and 2017, *Christoph Grabenwarter* since 2014; the latter is the current chairman of the Panel. Although they have greatly benefited from their discussions with the other Panel members, the authors solely carry the responsibility for the views expressed in this paper.

According to the French version the judges must

> "jouir de la plus haute considération morale et réunir les conditions requises pour l'exercice de hautes fonctions judiciaires ou être des jurisconsultes possédant une compétence notoire".

The first condition mentioned in Art. 21(1) is that of high moral character. This requirement seems to have only rarely given rise to controversies. In this connection reference can be made to the First Activity Report of the above-mentioned Advisory Panel of December 2013. In this report it is stated, *inter alia*, that

> "[i]n the Panel's discussions, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and absence of convictions for crimes were mentioned as key components of this requirement, as well as (obviously) independence and impartiality".[6]

In all activity reports published so far the Advisory Panel has noted that it is not expressly empowered to convene candidates for interviews; therefore, it is "difficult to make judgments concerning the character of candidates unless it is otherwise manifestly apparent".[7] No such manifest problems in this respect have been pointed out by the Advisory Panel,[8] and this condition is not dealt with in more detail.

Instead the main focus will be on the other criteria mentioned in Art. 21(1). They appear to reflect the idea that one may gain the competence foreseen in Art. 21(1) through two main avenues: 1) judicial experience and 2) recognition as a jurisconsult. While the practice of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights shows that both criteria need interpretation, it is especially the notion of "jurisconsult of recognised competence" that calls for clarification. It is against this background that this criterion is dealt with first. It seems that much of the general reasoning concerning the notion of jurisconsult can easily be transferred *mutatis mutandis* to the "high judicial office"

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[6] Advisory Panel (2013) 12 EN, 11.12.2013, para. 28 (where also reference is made to the Resolution on Judicial Ethics adopted by the Plenary of the European Court of Human Rights in 2008). This paragraph is also cited in the Second Activity Report for the attention of the Committee of Ministers, adopted by the Panel on 25.2.2016 (Advisory Panel [2016] 1, para. 34). This report is hereafter referred to as the "Second Activity Report".

[7] Second Activity Report (note 6), para. 34.

[8] It may be noted, however, that the Panel has on a few occasions received unsolicited messages from sources other than the Government with allegations to the effect that a particular candidate does not meet high moral standards. How unsolicited information is dealt with by the Panel is described in the Second Activity Report (note 6) (under "6. Sources of information").

requirement, whereas an analysis proceeding in the reverse order would probably be less simple.

III. The Requirement of "Jurisconsult of Recognised Competence"/"Jurisconsulte Possédant une Compétence Notoire" Under Article 21 of the Convention

Art. 21(1) was not an innovation when it was included in the Convention in connection with the reform brought about by Protocol No. 11. A provision with essentially the same contents had been part of the Convention from the very beginning. Moreover, that original provision was based on a model which had already existed in the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), since the 1920s. As Art. 21 and its reference to high judicial office and "jurisconsult of recognised competence" thus do not exist in a vacuum, it is worthwhile looking first at the historical antecedents and models of this requirement. As mentioned above, the paper first focusses on the notion of "jurisconsult".

1. "Jurisconsult" in the Statutes of the Permanent Court of International Justice and the International Court of Justice

Art. 2 of the Statute of the PCIJ[9] reads as follows:

> "The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required, in their respective countries, for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law."

Towards the end of the 1920s the question arose as to whether "recognised competence" referred solely to academic competence or whether such competence could also be acquired through practical experience. At the

[9] Statute and Rules of Court. First Edition, Series D. No. 1, 1926, available at <http://www.icj-cij.org> (accessed 19.2.2020).

Conference regarding the revision of the Statute of the PCIJ, held in Geneva in September 1929, under discussion was, among other things, a proposal to add after the words "of recognised competence" the words "and experience". At the end of the day, no such amendment was made, but several interventions made during the discussions reflected the understanding that "competence" included experience as well.[10]

Art. 2 of the Statute of the ICJ[11] reads as follows:

> "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

There do not seem to have been similar discussions about the need to change the jurisconsult part of the definition, perhaps because of a wide interpretation of that notion which emerged early and apparently has remained uncontested. This issue is commented in a Commentary of the Statute in this way:

> "As stated in Article 2, judges are elected from among persons, 'who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law'. These two categories of candidates, sometimes contrasting, include on the one hand practitioners with a long experience in domestic courts and, on the other, the doctrine to which Article 38 para. 1(d) of the ICJ Statute seems to refer as 'the most highly qualified publicists of the various nations'. But practice has added a third category of provenance: the diplomatic and civil service of States and/or international organizations. […] the ICJ has had such 'legal diplomats' among its members from its very beginning."[12]

Indeed, it seems that over the years several of the ICJ judges have been elected as "jurisconsults of recognised competence in international law", despite the fact that their academic merits alone would not necessarily justify this characterisation but because their diplomatic experience and writings

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[10] League of Nations: Minutes of the Conference Regarding the Revision of the Statute of the Permanent Court of International Justice and the Accession of the United States of America to the Protocol of Signature of that Statute, Held at Geneva from September 4th to 12th, 1929, Geneva, 31.10.1929.

[11] ICJ Acts and Documents No. 6. Charter of the United Nations, Statute and Rules of Court and Other Documents, available at <http://www.icj-cij.org> (accessed 19.2.2020).

[12] *A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams* (eds.), The Statute of the International Court of Justice – A Commentary, 2nd ed. 2012, 245 (footnote omitted).

on international law, in combination with other relevant experience, has been regarded as sufficient.[13]

It has been concluded that as regards the notion of jurisconsults of recognised competence in international law "the interpretation given by the UN […] has been admittedly liberal".[14]

Art. 2 of the Statute of the ICJ has influenced other jurisdictions, including the European Court of Human Rights and the Court of Justice of the European Union. Indeed, it has been concluded that "the criteria stated in Art. 2 may be seen as an established principle governing the international judicial organs".[15]

2. "Jurisconsult of Recognised Competence" as a Criterion of Eligibility to Become a Judge of the European Court of Human Rights

The criteria which a judge of the Court must meet have remained substantially unchanged since the entry into force of the Convention. Today they are included in Art. 21(1) which reads as follows:

> "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."[16]

Guidance for the interpretation of Art. 21(1) can be found in the Vienna Convention on the Law of Treaties (VCLT). Its Art. 31(1) reads as follows:

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13 "Even though some of these judges may have not strictly been 'international jurists of recognized competence' (indeed, some of them had merely written on public international law without being recognized as even competent international jurists, let alone having a distinguished reputation, as some judges have had before they were elected), they would appear to have been elected under the second alternative [i.e. 'jurisconsult'], as it had been broadly interpreted by the UN." *C. F. Amerasinghe*, Judges of the International Court of Justice – Election and Qualifications, LJIL 14 (2001), 335 et seq. (340).

14 *C. F. Amerasinghe* (note 13).

15 *A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams* (note 12), 37.

16 The Convention as amended by the 11th Protocol. In French: "Les juges doivent jouir de la plus haute considération moral et réunir les conditions requises pour l'exercice de hautes fonctions judiciaires ou être jurisconsultes possédant une compétence notoire." Originally, the corresponding provision was in Art. 39(3). It was identical with what is now Art. 21(1) with the exception that the second word was "candidates" (instead of the present wording referring to "judges"). This difference (which is purely formal) reflects the fact that in the original text the basic qualification of judges and their election were dealt with in the same Article (39), whereas today the two questions are covered by two different Articles. (21 and 22).

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context read in the light of its object and purpose."

Accordingly, one should proceed from the ordinary meaning of the text in its "context". One may distinguish between "external" context and "internal" context. The Convention does not exist in a vacuum; it is rather part of international law, which has influenced and influences it in many ways. Thus, as confirmed by the *travaux préparatoires,* Art. 21(1) is modelled on the Statute of the ICJ.[17] In addition to being part of universal international law, the Convention is at the same time part of what may be called the European legal order, the other main component of which is the law of the European Union (EU). EU law and practices developed within its framework also form part of the larger context of which due account must be taken in the interpretation of Art. 21(1) in so far as comparable issues are regulated in the two branches of European law.[18] It should be mentioned that Art. 253 Treaty on the Functioning of the European Union (TFEU) contains an identically formulated reference to the jurisconsult criterion, whereas the parallelism between the two provisions does not hold with regard to judges (see below under section IV.).

However, when drawing inspiration from the external context outlined above, one should keep the Convention context in mind. Therefore, the ICJ example of "jurisconsult of recognised competence in international law" should be taken into account *mutatis mutandis* so that the "recognised

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[17] Cour Européenne des Droits de l'Homme, Travaux préparatoires de l'Art. 43 de la Convention (constitution et rôle des chambres), Conseil de l'Europe, Strasbourg, 24.2.1959, Document d'information rédigé par la Direction des Droits de l'Homme, 3. According to Art. 32 of the Vienna Convention *travaux préparatoires* may be resorted to as a supplementary means of interpretation "in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 *inter alia*, "leaves the meaning ambiguous".

[18] According to Art. 253 of the Treaty on the Functioning of the European Union (TFEU) "the Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence". This provision was directly inspired by Art. 2 of the ICJ Statute. *J.-M. Sauvé*, Le rôle du comité 255 dans la sélection du juge de l'Union, in: A. Rosas/E. Levits/Y. Bot (eds.), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law, 99 (103). In the EU there also exists a body, the so-called "Article 255 Panel", which bears certain resemblance to the (Convention) Panel, for which it served as a source of inspiration. See the Article of *Sauvé* just mentioned. In general, on the election of judges to the two European main courts, ECHR and the CJEU, see *M. Bobek* (ed.), Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts, 2015.

competence" should not only – or not even primarily – pertain to general international law but especially to Convention law and fields of law and experience relevant to it. At the same time it should be kept in mind that the basic qualifications to deal with Convention issues can be acquired and shown "in a number of ways other than working with such issues on a day to day basis", as stated in para. 45 of the Second Activity Report of the Advisory Panel. The Panel goes on in the same paragraph as follows:

> "It may be said that a professor of European and/or public international law might normally be regarded as having a competence in the field covered by the jurisdiction of the Court, even if he or she has not specialised in human or fundamental rights law and the same would be true for professors of constitutional law. In these and other fields, however, professors should show some real engagement during their career with questions of human rights related to their field of law, e.g. a professor of criminal law may have dealt with the right to freedom, rule of law, fair trial and so forth. The selection of persons other than professors, such as advocates, legal professionals in the public (including political) or private domains, particularly where they have, through long experience, professional intimacy with the functioning of courts, is also possible as long as those persons by virtue of a mature professional experience qualify as 'jurisconsults of recognised competence'".

In addition to the context, the object and purpose of the Convention as an instrument intended to guarantee rights which are practical and effective rather than theoretical and illusory should be taken into account in the interpretation.[19] The effectiveness of the Convention is influenced by the willingness of national authorities to follow the judgments of the Court. They will be ready to follow if the quality of the reasoning is high and if the reputation of the Court is beyond doubt. The reputation of the Court is created in a long term process, and it is to a large extent dependent on the quality of the judges. If they come from high level positions in the member states they contribute to a good reputation of the Court. If, however, a considerable number of judges are relatively young and have not reached a prominent position in the national judicial system or in the academic world, the acceptance of the Court's case-law may be negatively influenced. In other words: to fulfil the object and purpose of the Convention the Court should enjoy authority and respect among the member states and their judiciaries.

The Court itself has emphasised the importance of the quality of the judges to its own authority. In its Advisory Opinion of 12.2.2008 the Court

[19] See e.g. *Airey v. Ireland,* Judgment of 9.10.1979 (Series A 32), para. 24.

held that although certain conditions not mentioned in Art. 21(1) can be taken into account in the election of the judges, such considerations

> "cannot release Contracting Parties from the obligation to present a list of candidates each of whom fulfils all the conditions laid down in Article 21(1), which relate exclusively to candidates' moral qualities and professional qualifications. Moreover, compliance with this requirement is also of considerable importance for the Court, in the sense that it is vital to its authority and the quality of its decisions that it be made up of members of the highest legal and moral standing."[20]

Concern about the quality of the judges was also raised in the Interlaken Declaration of 2010,[21] and it was likewise a central concern behind the proposal made later the same year by President *Costa*, as he then was on the establishment of the Advisory Panel.[22] Both the Advisory Opinion and the other sources mentioned reflect the idea that the judges must guarantee not only the high quality of the Court's decisions but also its authority and overall credibility. For this purpose excellent skills are not enough but the judges should also enjoy high esteem among their national peers on the ground of their previous career. It is obvious that considerations of this kind have led the EU (Art. 255 TFEU) Committee to require as a point of departure that judges (and advocates general) have a high level professional experience of at least some twenty years before joining the Court of Justice of the European Union (CJEU).[23]

All the considerations put forward above militate in favour of a rather strict interpretation of the notion of "jurisconsult of recognised competence" (as well as of that of a person qualified for "high judicial office" for that matter, see below). Therefore, although past practice should be taken into account in the interpretation, one should in no way feel bound by all "precedents" from a time when the election of the candidates, and thereby

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[20] 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, 12.2.2008, para. 42.

[21] High Level Conference on the Future of the European Court of Human Rights, Interlaken, Declaration of 19.2.2010. See also para. 21 of the Brighton Declaration of 2012 ("The authority and credibility of the Court depend in large part on the quality of its judges and the judgments it delivers.").

[22] In his letter of 9.6.2010 *Jean-Paul Costa* wrote, *inter alia*, that: "In terms of the future of the Court and therefore the Convention system, one of the decisive factors will be the quality of its Judges. Whatever reforms are undertaken, the system will fail if judges do not have the necessary experience and authority." The letter is to be found as Appendix to PACE Doc. 12391 of 6.10.2010 (Committee of Legal Affairs and Human Rights: National Procedures for the Selection of Candidates for the European Court of Human Rights).

[23] Report of the Article 255 Committee.

the election of the judges, was very much in the hands of the Governments, there existing no elaborate recommendations on the national procedures, no hearings before the Parliamentary Assembly of the Council of Europe (PACE)[24] and no panel of experts on election as judge to the European Court of Human Rights.

When we move to analyse the concept of "jurisconsult of recognised competence" with the above considerations in mind, it is not difficult to find a generally accepted core area of this notion. It seems that a reference to a "jurisconsult of recognised competence in international law" was added to the statute of the PCIJ above all in order to guarantee that not only high level judges but also leading international law scholars (who may not have judicial experience) were eligible.

Also in the Convention context it has always been indisputable that jurisconsult includes reputed legal scholars. As stated by *Jean-Paul Costa* in the letter proposing the establishment of the Advisory Panel,

> "To be a 'jurisconsult of recognised competence' requires extensive experience in the practice and/or teaching of law, the latter generally entailing publication of important academic works. One objective indication of this requirement would be the length of occupation of professorial chair."

Thus a notoriously reputed professor, or a professor who has held a chair at a well-reputed university for several years, are examples of jurisconsults clearly meeting the criteria of Art. 21(1), provided their fields of teaching and research have sufficient connection with human rights and Convention law. On the other hand, not even the holding of a chair of human rights law as such is sufficient to make a professor a "jurisconsult of recognised competence" if the appointment to the chair is of a recent origin and was not preceded by publication of important academic works or other relevant experience. In other words, short time may be compensated by more specialisation, less specialisation may be compensated by longer experience and a higher *notorité* as a legal scholar. Difficulties may arise if the candidate has published only or mostly in languages not widely understood by the relevant European legal community. In such cases further information may have to be obtained in the course of the election process.

In this context one should bear in mind that the academic systems and their respective reputation differ considerably throughout Europe. There are states where university professors and their expert opinions generally enjoy high reputation, which is reflected by the role they play in court proceedings, in the preparation of laws in Government as well as in Parliament,

[24] Or any committee such as the now existing Standing Committee.

not to forget the media. On the other hand, professors may – more or less – be reduced to teaching personnel at university, their research not finding wider reception in the legal or public debate.

There are also systems where professors hold part time positions or even only "*pro bono*" functions that reflect their recognised competence. These functions relate to various activities at national as well as at international level where a professor's competence contributes to the quality of the work of a board or a commission. Reference may be made to professors serving as ombudspersons, as members of bodies of broadcasting supervisory boards or in the control of financial markets, in human rights supervisory bodies, and other bodies of experts at national level. At international and European level examples of bodies where members have to provide their expertise and gain further experience in the field of human rights are the Committee for the Prevention of Torture (CPT), bodies of the Social Charter, the Council of Europe Commission "Democracy through Law" ("Venice Commission") or the Group of States against Corruption (GRECO). Experience gained through such activities may weigh in the overall evaluation of the question whether the person is jurisconsult of recognised competence.

Initially, the word "jurisconsult" was widely understood to be synonymous with a university post. This is reflected by number of translations of the Convention. In the German versions of Germany, Switzerland, Austria and Liechtenstein the word "jurisconsult" is translated with "*Rechtsgelehrter*", in the Finnish version it is the equivalent "*oikeusoppinut*", and the same goes for the Swedish version ("*rättslärd*"). The more recent text of Art. 253 TFEU hints in a different direction: while "jurisconsult" has been retained in the English text,[25] the German version refers to "*Jurist*", which is a much broader notion than that of "*Rechtsgelehrter*". Similar development is discernible as regards other language versions.[26] While, therefore, it is clear that under EU law also non-academic professional reputation may amount to "recognised competence" as a jurisconsult, the same conclusion may be drawn under Art. 21 of the Convention as well. This is in line with the practice relating to the ICJ and its predecessor as well as with the above quotation from the letter of President *Costa* who, indeed, states that being a jurisconsult within the meaning of Art. 21(1) presupposes "extensive experience in the practice *and/or* teaching of law" (emphasis added).

Indeed, being a practising lawyer may give the necessary experience to justify the characterisation as a jurisconsult, especially if combined with le-

[25] The French text of Art. 253 TFEU similarly refers to "jurisconsultes".

[26] Thus, in similarity to the change in the German version the Swedish version of Art. 253 TFEU refers to "jurist". The Finnish version refers to "lainoppinut".

gal writing activity. For example, barristers in common law jurisdictions argue cases on a day to day basis in a way which may give them expertise comparable to that of academic lawyers. Also in other jurisdictions a good advocate must have a profound understanding of the judicial process, the canons of interpretation so that he or she can not only advise clients but also convince a court of the correctness of his understanding of law. An experienced, outstanding practising lawyer may very well meet the condition of "jurisconsult" within the meaning of Art. 21.

Such a wide understanding of the notion of "jurisconsult" is not only shared by other courts[27] but it is also born out in legal scholarship. According to a well-known textbook on the Convention from 2009 the term of jurisconsult of recognised competence, "taken to mean 'experts in law', considerably expands the pool of eligible candidates". The authors go on saying that:

> "The result is a Strasbourg judiciary of diverse professional backgrounds: the current court includes former supreme and constitutional court judges, academics, former diplomats, prosecutors, and those recruited from the practising bar in contracting parties."[28]

Although not all persons with a similar background who, in the past decades, have been elected to the Court, qualify under a strict test of "jurisconsult of recognised competence", experience of that nature may, depending on the circumstances, give the necessary expertise to justify such a qualification. In this context it is important to stress that being a "jurisconsult" in this meaning means more than just having good qualities and expertise as lawyers at a certain level. One may have acquired good knowledge of human rights and the Convention by attending courses on the subject and listening to lectures but without long academic or other professional experience and one's own publications even a lawyer with solid knowledge of the Convention law may fail to qualify as a jurisconsult. The necessary experience justifying the person's characterisation as jurisconsult may be of a varying nature, so that you may find jurisconsults in this meaning among experienced practising lawyers, prosecutors, diplomats, legal advisers of foreign offices, ombudspersons, to name a few. All depends on the circumstances

[27] Regarding the ICJ, see above. As to the CJEU, according to an Austrian Commentary on the Treaties, "jurisconsult of recognised competence" in Art. 253 of the TFEU refers to "hervorragende Kandidaten aus dem Bereich der Wissenschaft, Anwaltschaft und Verwaltung" (i.e. legal science, practice and administration). *E. Riedl/W. Posch*, in: H. Mayer/K. Stöger (eds.), Kommentar zu EUV und AEUV, 2012, Art. 253, 24.

[28] *D. Harris/M. O'Boyle/E. P. Bates/C. M. Buckley* (eds.), Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights, 2nd ed. 2009, 813.

but one important factor to be taken into account is whether the candidates have, in addition to their professional activities, shown their expertise through publications of certain importance in the field of or relating to human rights.

Thus it is not enough for the candidate to be a "diplomat of recognised competence" or "prosecutor of recognised competence" etc. Rather the experience gained in these positions must be of such a nature as to give the person profound knowledge of human rights law, including the Convention. A lawyer diplomat having extensively participated in negotiations concerning human rights instruments, a prosecutor specializing in particularly human rights sensitive crimes or a practising lawyer with extensive experience of human rights law before national and/or international bodies, could be cases in point. There may be other examples, such as Ombudspersons or holders of similar offices who in many countries play an important role in the protection and furtherance of human rights. Even important Non-Governmental Organization (NGO) activities of a legal nature in the field of human rights, if combined with publications or other relevant experience, may be taken into account in the determination of whether the candidate is a "jurisconsult" within the meaning of Art. 21(1). The pool of people who potentially qualify under this article has no doubt grown over the last decades, as the ECHR has permeated many areas of member states' domestic legal systems, with the consequence that more and more legal professionals have been confronted with Convention issues.

As the above discussion already implies, the fact that Art. 21(1) makes a distinction between those qualified to "high judicial office", on the one hand, and "jurisconsults of recognised competence" on the other, does not exclude the possibility of a combination of elements falling under the two headings being sufficient under Art. 21(1). Thus a combination of judicial activities and academic work, although neither alone would be enough under Art. 21(1), can in an overall assessment justify the conclusion that the candidate is a jurisconsult of recognised competence within the meaning of the provision. Consequently, possible candidates under the head of the "jurisconsult" criterion may be found among lawyers who have not pursued an academic career but who started as assistants at university and/or as Ph.D. students and who stayed in touch with university while publishing constantly in a field of law related closely to the Convention. In practice this would lead in many cases to teaching experience at university and types of (honorary) professors not holding a chair. An overall evaluation of such a

combination of academic and non-academic experience may justify the conclusion that the candidate is a "jurisconsult of recognised competence".[29]

In this spirit the Advisory Panel

> "endeavours to obtain a comprehensive picture of the candidates and carries out a global assessment of all the qualities of a candidate, whatever, his or her professional career path, with a view to determining whether a candidate has an aptitude for exercising the judicial function at a high level which is appropriate for a constitutional or international court (of which knowledge of human rights law is only one, albeit important, component)".[30]

This is also in line with the approach of the EU Panel (Art. 255 TFEU) which makes a global evaluation of the candidate's competence on the basis of six elements relevant in such an evaluation.[31]

IV. "Qualifications Required for Appointment to High Judicial Office" as a Criterion Under Article 21(1) of the Convention

The second criterion of Art. 21(1) of the Convention refers to "the qualifications required for appointment to high judicial office". A person who fulfils this criterion is also eligible to become a judge of the Court regardless of his/her possible academic experience. As in the case of the jurisconsult-criterion, the interpretation in this respect should also proceed from the "ordinary meaning given to the terms […] in their context" in light of the object and purpose of the Convention (Art. 31(1) VCLT).

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[29] See the *Costa* letter (note 22) ("experience in the practice and/or teaching"). One may think of somebody with many years' experience gained in the registry/secretariat of an international or transnational court (which does not qualify as a high judicial office), combined with important academic publications but without the person ever having held a professorial chair, and therefore not meriting the qualification of "jurisconsult of recognised competence" on account of these academic merits, who may nevertheless be regarded as a jurisconsult within the meaning of Art. 21(1) on the basis of an overall assessment of the person's merits.

[30] Second Activity Report (note 6), para. 36.

[31] See *J.-M. Sauvé*, Chair of the Committee established by Art. 255 of the TFEU, First Activity Report of the Committee, 6. The Report is reproduced in HRLJ 33 (2013), 459 and referred to in the Panel's Activity Report 2010-2013. Advisory panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, 11.12.2013, para. 27 ("The Panel shares this endeavour [i.e. the endeavour of the Article 255 Panel] to obtain a comprehensive picture of candidates."). The Panel's Activity Report is reproduced in HRLJ 34 (2014), 204.

As to the wording, Art. 21 differs from Art. 2 of the Statute of the ICJ and Art. 253 of the TFEU in two respects. First, unlike the provisions governing the ICJ and the CJEU, Art. 21 of the Convention does not require a candidate to have the qualifications for appointment to the "highest" judicial office, qualifications for "high" judicial office being sufficient. Secondly, at the same time Art. 21 of the Convention does not contain any further reference whereas the texts governing the elections of judges of the ICJ and the CJEU require that candidates should be qualified for the highest judicial offices "in their respective countries".

Although reference to "high judicial office" in Art. 21 undoubtedly was also intended to refer primarily to judicial offices in the respective member states, the wording is open to the adoption of a substantive, or even autonomous, interpretation – at least to some extent – detached from concrete requirements under domestic law. On the one hand, the wording means that a candidate cannot be automatically rejected merely on the ground that he/she fails to fulfil one or another criterion required for the appointment to the highest national court. On the other hand, the wording is not an impediment to a reading of the notion of "high judicial office" which includes such effective and substantive requirements as seem appropriate "in the context" and in light of the "object and purpose" of the Convention, although these requirements may go further than what is required under domestic law and practice of even judges of the highest courts.

In most cases, national legislation provides for formal criteria in particular for a career judge without a distinction with a view to the instance where a judge serves. However, all states have a system of hierarchy with different levels of jurisdictions and it is the rule that a judge serves in first instance for some years before becoming eligible to be appointed as a judge at an appeal court and possibly later on as a supreme court judge. Often there are no explicit rules in statutes but it is clear that only judges of a certain seniority and judicial experience may apply to a post at a higher court. It is the rule that the quality of the work at first instance is the predominant and decisive factor for the decision whether a judge who has served at a lower instance for some years is appointed at the appeal or supreme court level. This practice has to be taken into account in the interpretation of the notion of "qualifications required". Longer lasting experience as a judge of at least ten to 15 years, some of them at a higher level of jurisdiction, seem to be the minimum requirement.

In this context the field of law covered by the work of a candidate judge is relevant. Work in a special court that has little connection with human rights law contributes less to the experience required by the "high judicial

office"-criterion, considering that a judge in Strasbourg is faced not only with routine cases but also with constitutional type of issues raising questions as to whether Convention law should be restated or extended with a new or novel interpretation.

Experience in criminal or civil courts for a number of years at two levels of jurisdiction is a certain guarantee that a judge has come across a large number of problems of human rights and also a certain range of different fields of human rights. The same goes for administrative courts with general jurisdiction. By contrast, a judge who has worked in a special court (asylum court, family court, labour court) only in first instance, has perhaps a deep experience also in human rights issues under one or two articles of the Convention; although there may be serious human rights issues in the daily work of the judge concerned, he or she is, however, not *per se* familiar with problems in a broader range of human rights issues or the constitutional type of issues concerning the borderline between State sovereignty and international supervision which the European Court of Human Rights occasionally must draw.

On the other hand, in states where there is a Constitutional Court, judges of such a court are normally by definition accustomed to constitutional type of issues involving weighing of important interests against each other. The appointment is typically open not only to career judges but also to professors, practising lawyers, former civil servants etc. In practice there are a lot of judges in national constitutional courts with such a professional background. At the outset it should not be disputed that a person who has served for some years at a Constitutional Court fulfils the criteria. At the same time the national constitutions and relevant laws may contain very general criteria[32] that could be theoretically fulfilled by a lawyer at the age of 30 or 35. In accordance with what has been said earlier, such formal competence is not sufficient for the purposes of Art. 21 if the judge's experience

[32] According to German Law, the judges at the Federal Constitutional Court are either federal judges or "other members" (Article 94 para. 2 Basic Law). Three judges of each of the two senates are elected from among the judges at the supreme courts at federal level; only judges shall be elected who have served at least three years at a supreme court (section 2 of the Law on the Federal Constitutional Court). The minimum age ist 40 years, they must be eligible to Parliament and have the qualification to the office of judge (section 3). In Austria, members of the Constitutional Court must have completed studies of law and worked for ten years in a legal profession (Article 147 para. 2 Federal Constitution). Six of the judges, the President and the Vice-President are appointed following proposals by the Federal Government from among professors of law, judges, and civil servants. In recent years, there is a constant practice to appoint only senior civil servants, judges and professors, whereas some of the professors appointed in earlier years have been relatively young (around or even below 40 years).

is limited. If there is a national practice that judges are only appointed after a long lasting experience in a judicial profession at the age of 45-50 and above this practice has to be taken into account.

Similar considerations apply *mutatis mutandis* to highest administrative courts in some countries where such courts have constitutional or similar functions and members recruited from various backgrounds. If highly qualified, experienced practitioners are eligible to be appointed to high judicial office in the respective state, they may also meet the high judicial office requirement of Art. 21. However, more often than not it may be more appropriate to regard such a qualified practitioner as a "jurisconsult of recognised competence" (see above section III.).

Strict interpretation of also the high judicial office requirement is confirmed by the "context" and the object and purpose of the Convention in the sense indicated above. The considerations put forward in connection with the notion of jurisconsult apply *mutatis mutandis* or, arguably, in some respects even *a fortiori*. As the Court "can issue judgments which in effect depart from or even implicitly overrule judgments of the highest national courts",[33] the confidence of these latter judgments presupposes that the composition of the Court should not create the impression that the professional level of some of its judges coming from the national judiciary are inferior to that of their peers at those national courts or other international (including European) courts.

All these considerations speak in favour of an interpretation requiring very high quality also of those candidates whose competence is primarily measured against the requirement relating to "high judicial office". While it is not excluded that a court of appeal judge, if he or she, for example, has alongside the judicial career produced scholarly publications of a certain level, meets the criterion, it is no less excluded that even a judge of a highest national court does not fulfil the "high judicial office" requirement within the meaning of Art. 21.

In its Second Activity Report the Advisory Panel stated with a view to this requirement:

> "The provision must be given a substantive interpretation consistent with its purpose and not purely a formal one. Accordingly, even in the case of candidates holding office in a highest national Court, the Panel's view is that such persons should not, for that reason alone, be automatically considered qualified to be candidates for election to the Court."[34]

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33 First Activity Report, para. 29.
34 Second Activity Report (note 6), para. 37.

As discussed earlier, a combination of judicial experience and merits as a jurisconsult may justify the conclusion that the candidate meets the standard of Art. 21. Thus a judge whose qualifications are primarily measured against the "high judicial office" requirement but in whose case it is doubtful whether this requirement is met, may in a borderline case nevertheless be considered qualified on account of his or her scholarly publications. However, in such a situation it may be more appropriate to regard the candidate as falling under the more open notion of "jurisconsult", although sometimes it may be difficult (and not absolutely necessary) to decide which head of Art. 21 is applicable.

V. Recent Developments

In recent years the examination of lists of candidates by the Advisory Panel has been gradually intensified. One important issue concerns the national procedure. According to Point VI 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, a Government, when sending its list of candidates to the Advisory Panel, should also submit information on the national selection procedure followed.[35] In its Fourth Activity Report the Advisory Panel made it clear why its scrutiny also covers the national selection procedure to a certain extent. It stated:

> "While the Panel is not expressly called on to review the details of the national selection procedure, it is evident that the requirement of submitting such information cannot be devoid of purpose. In particular, it cannot be the position that the Panel is to take no account at all of the information in the discharge of its task."[36]

Consequently, the Advisory Panel – fully in line with the expectations of the PACE – now draws attention to aspects of the information provided by the Government on the national selection procedure, notably with regard to fulfilment of the minimum requirements of fairness and transparency.[37]

From a procedural perspective, the PACE, and in particular its Standing Committee on the Election of Judges, has intensified its co-operation with the Advisory Panel. In its current practice the PACE committee would re-

[35] Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, CM(2012)40-final.
[36] Fourth Activity Report, para. 21.
[37] Para. 8.2.2, PACE Standing Committee, Resolution 2248 (2018).

ject the list of candidates if the Panel "has not been duly consulted". This covers cases where the Panel has found that a candidate was not qualified under Art. 21 of the Convention. This practice has led to the practice of governments not to present a list to the PACE on which the Advisory Panel has given a (partly) negative assessment before. The risk of failure before the PACE committee would be too high.

While the Panel remains a body whose task is to advise Governments when they establish their lists of candidates it was open for advice also to the PACE Committee. Since 2017 a representative of the Advisory Panel is invited to the meetings of the PACE Committee on the Election of judges.[38] While the representative of the Panel (in most cases its chairperson) does not participate in the hearing of the candidates itself the PACE Committee holds an exchange of views with the representative of the Panel on the candidates on the list in the briefing sessions held immediately before the hearings. This kind of co-operation helps the PACE Committee to gain a deeper insight in the evaluation process of the Advisory Panel and its results.

These developments strengthen the selection procedure in a step by step approach. Currently, the representative of the Advisory Panel does not yet participate in the hearings of the candidates. For the future work of both, the PACE and the Advisory Panel, such a step could have advantages. The expert opinion of Advisory Panel members could be used in the final stage of the procedure. On the other hand, the Advisory Panel would get a more complete impression on the candidates it has evaluated before. Of course this cannot have any influence on the concrete list because the Panel does not intervene at this stage of the selection procedure. However, and bearing in mind that this aspect should not be overestimated, the personal impression of candidates after having examined them in a written procedure contributes to a more precise approach in cases of future candidates with a similar profile. Although the selection of candidates is an individualistic procedure, seeing candidates after having studied their application broadens the experience for future evaluation with a view to certain career paths of candidates in member states with similar legal traditions or similar systems of legal education. Currently, this kind of "feedback" only takes place with a view to the successful candidates who become judges at the ECtHR. Their performance at the Court becomes visible to the Panel members by ways of formal and informal contacts in conferences and seminars, in separate opinions or the fact that they become (Vice-)Presidents of Sections in the Court.

There remain of course open questions. One of these questions is the issue of language skills. Although not mentioned expressly mentioned in Art.

[38] PACE Resolution 2248 2(018); Fourth Activity Report, para. 67.

21 a judge of the Court must be fluent in one of the Convention languages and must have a good knowledge (at least in reading) of the other language. This is a precondition for the work with the case files at the Court. Future selection procedures will have to have a focus on this question. The Panel is in a weak position in this respect as it evaluates candidates on the basis of the written CVs and application forms which include a statement on language skills. However, these statements have turned out to be not correct in a number of cases, and the Panel cannot examine the validity of the statements. Therefore, for the time being, it remains primarily with the PACE committee to take care of this issue.

VI. Concluding Remarks

High level quality of judges is a precondition for the credibility of the Court; the credibility in turn is a precondition for the effectiveness of the Court in its task of securing and furthering human rights in Europe. The method of electing judges is, among other things, of importance. The fact that the Parliamentary Assembly is the electing body enhances the credibility by giving certain democratic legitimacy to the Court. However, the Assembly is a political body, and therefore counterbalancing elements are needed to avoid the appearance of an overly political influence in the election of judges.

Such counterbalance is provided by the Panel, which brings into the process an element of independent legal expertise, thus reducing the risk that political considerations prevail over legal ones in the application of Art. 21 which, after all, is a legal provision and has to be interpreted accordingly. Ideally, the interplay between the Panel and the other stakeholders, especially the Parliamentary Assembly, creates an appearance of a fair and balanced election process contributing to the election of high level judges.

However, appearances are not enough. The old adage according to which "justice should not only been done, it should also be seen to be done" can, in a way, be turned on its head: The election process should not only be such that it appears to give the Court only high-level judges who fulfil the conditions of Art. 21, it should also in reality lead to this result. The experience of the Panel suggests that this is not necessarily always the case.

The number of career judges (in particular at a higher instance) is still too low. Empirical research carried out at the Vienna University of Business has shown that only around 40 % of the candidates elected between 2000 and

2018 were judges while around 30 % were professors.[39] Statistical figures of the Advisory Panel on recent lists confirm this result. According to its Fourth Activity Report, referring to 11 lists in the years 2017 to 2019, 41 % of the candidates were judges, 30 % were professors.[40] Thus, already in the first two activity reports the Panel has expressed concern "about the low number of candidates with substantial judicial experience, particularly in the highest courts".[41] This lack of most experienced high level judges may have a variety of reasons, some of which have to do with the national selection processes, and it does not necessarily prevent very qualified lawyers with a different background from being elected to the Court. Even so, this trend, if it continues, may make it difficult to guarantee the diversity of experience and background of judges which is also important for the credibility of the Court.

Moreover, in light of the experience of the Panel, the lack of diversity and balance of backgrounds of candidates and thereby ultimately of the bench of the Court is not the only problem. Among candidates whose qualifications are primarily evaluated under the jurisconsult criterion states sometimes propose candidates who no doubt are good lawyers with considerable knowledge of the Convention but who cannot be regarded as "jurisconsults of recognised competence" under the strict interpretation outlined above.

In a number of cases candidates not regarded as qualified by the Panel have been replaced by others, in a few others the negative view of the Panel may have played an important role in the non-election of candidates who, despite the negative opinion of the Panel, were retained on the list.[42] However, there have also been cases in which a candidate not considered by the Panel to be qualified according to the criteria of Art. 21 has ultimately been elected to the Court.[43]

The fact that the Panel itself is not always unanimous in its evaluation of a particular candidate shows that the question is sometimes far from straightforward.[44] Even so and despite our belief that the Panel has contributed to the improvement of the level of candidates it so far has not succeeded in guaranteeing that only candidates meeting the high requirements of

[39] *U. Prokes*, Die Wahl der Richter am EuGH und am EGMR, Masterarbeit an der Wirtschaftsuniversität Wien 2019 (unpublished), 87 et seq.

[40] Fourth Activity Report, para. 56.

[41] Para. 33 of the First Activity Report; Second Activity Report (note 6), para. 42.

[42] See First Activity Report, paras. 38-42, Second Activity Report (note 6), paras. 48-54.

[43] This happened on two occasions during the period covered by the Second Activity Report (note 6), see para. 54. During the period covered by the First Activity Report, the same happened in one case. In recent years this has not happened any more.

[44] See Second Activity Report (note 6), para. 53.

Art. 21 of the Convention, when interpreted in light of the object and purpose of the Convention and the provision in question, are put to the vote before the Parliamentary Assembly. This is problematic, as the European Court of Human Rights deserves and needs to have only judges whose qualifications as measured against the requirements of Art. 21 of the Convention are beyond any doubt.