

# Op-Ed

---



Laurence Burgorgue-Larsen

## “Elections at the ECtHR in times of Democratic Backsliding: Who are the Three New Judges from the East?”

[www.eulawlive.com](http://www.eulawlive.com)



stay alert | keep smart

**Suggested citation:** Laurence Burgorgue-Larsen, “Elections at the ECtHR in Times of Democratic Backsliding: Who are the Three New Judges from the East?”, *EU Law Live*, 10 January 2022



# “Elections at the ECtHR in times of Democratic Backsliding: Who are the Three New Judges from the East?”



Laurence Burgogue-Larsen

Despite considerable improvements in the elective mechanism at the level of the Parliamentary Assembly of the Council of Europe (fn 1), much is at stake at the level of national selection processes for the election of judges to the European Court of Human Rights (ECtHR), which still suffer from far too much opacity and even bias, rooted in the sociology of national institutions (as a notable exception, we refer to the Moldovan selection process: not only is the composition of the selection committee particularly extensive and diverse, but also the hearings are transparent by being made public on *You Tube* (fn 2).

At a time when Europe – like many countries throughout the world – is facing a vertiginous democratic backsliding in which old authoritarian States rub shoulders with young illiberal States, the process of electing judges has become absolutely critical. If for a long time the question of their competence was a real concern, in particular following the enlargement of the

Council of Europe to the East (fn 3), now that of their profile is at stake, especially when the State that proposes a list of three names belongs to the club of non-democratic States and/or when it is crossed by powerful populist movements (fn 4).

When Russia, Moldova, the Czech Republic or Ukraine are in the queue to propose their ‘three-name lists’, one should obviously pay particular attention. So, who succeeded Dimitri Dedov (the author of a nauseating dissent under the [Bayev et al. v. Russia](#) judgment of 20 June 2017 concerning discrimination against homosexuals); Valeriu Gritco (who hardly distinguished himself during his term of office); Ales Pejchal (signatory of a separate opinion under the Grand Chamber judgment [N.D. and D.T. v. Spain](#) of 13 February 2020, revealing an unprecedented ignorance of comparative regional human rights law and staggering prejudice against African migrants); and to Ganna Yudkivska (whose concurring opinion in the [Carvalho Pinto de Sousa Morais v. Portugal](#) judgment of 25 July 2017 developed an

innovative analytical approach to stereotypes of women that will remain memorable)?

Let us start by lifting the suspense with regard to Ukraine. For the second time in a row, the list presented by the Government of Kyiv did not pass the evaluation by the Committee on the Election of Judges which considered, on 21 September 2021, that it did not meet the criteria required by the Parliamentary Assembly and the Committee of Ministers. Given the very different and unequal backgrounds of the three candidates (two men and one woman) [Assembly Secretariat, [Communication](#), Doc. 15359, Sept. 2021], many hypotheses come to mind to identify the reasons for such a rejection.

The first one is Gaiane Nuridzhanian's lack of experience. Born in 1985, having completed her PhD in 2020 at UCL and having just been recruited to the University of Kiev in 2021 as a Senior Lecturer, the female candidate – although undoubtedly a good internationalist lawyer – was certainly the 'weakest link' in the list, given the more extensive backgrounds of the other two male candidates. Mykola Gnatovskyy, in addition to having a rich academic background, has been a member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) since 2009, while Oleksandr Merezhko, after having practised in Ukraine and abroad as a professor of international law, has above all developed a political career in the sphere of international institutions and, above all, as a member of the Ukrainian delegation to the Parliamentary Assembly of the Council of Europe, of which he became one of the many [Vice-Presidents](#). On discovering this candidacy, the reader senses a conflict of interest. Could this be the 'official' candidate that the Government of

Vladimir Zelenskyy would like to impose? When we discover that Mrs Maria Mezentseva opposed, on behalf of the Ukrainian delegation within the PACE, the rejection of the list presented in her country's name (fn 5), we feel that this second possibility should not be overlooked. What was only an intuition became a certainty when one discovered the very well documented article '[Why was the list of candidates for the position of a judge of the European Court of Human Rights from Ukraine rejected?](#)', written by Yevgeniy Zakharov and published on the website of the NGO *Kharkiv Human Rights Protection Group* (KHRPG). The reasons for the invalidation of the list are spelled out: in addition to the dubious quality of the functioning of the national selection committee, the rather sulphurous profile of Oleksandr Merezhko seems to have been a determining factor in the inflexible approach of the Parliamentary Assembly. While Ganna Yudkivska was elected to the Court in 2010 and her term of office was supposed to end in 2019, the carelessness of the Ukrainian authorities combined with the rigour of the examination conducted by the Commission on the election of judges, thus allows the current Ukrainian judge to play the game for longer.

This extreme scenario – which certainly does not bode well for the serenity of relations between Ukraine and the Council of Europe – was not the case for the election of the new Russian (Mikhail Borisovich Lobo), Czech (Katerina Simacková) and Moldovan (Diana Sarcu-Scobioala) judges at the session of 28 September 2021. The former took office on 2 January 2022, while the latter two have been in office since November 2021. The first two were ranked first by the Commission on the Election of Judges, while the third was tied with Vladimir Grosu. However, apart from this

last case where the Plenary had to decide (Diana Scobioala was finally elected with 122 votes out of 227 votes cast, against 102 votes for the former agent of the Moldovan government before the Court), the Assembly followed the Commission's opinion by electing the other two candidates rather comfortably, by exceeding the necessary absolute majority. Mikhail B. Lobo obtained 187 votes out of 209 votes cast (against 4 votes for A.Y. Bushev and 18 votes for N. V. Pavlova); while Katerina Simacková obtained 204 votes out of 222 votes cast (against 10 votes for T. Langasek and 8 for P. Simon); in other words, her election was masterly.

Looking at the CVs of these three newcomers, there is no doubt about the level of their skills. Mikhail B. Lobo is, so to speak, an insider in the Council of Europe's administrative superstructure. While since 2014 he has had the status of Head of the Human Rights Policy and Co-operation Department in the DG for Human Rights and Rule of Law, his career prior to that date was spent both in the Court's Judgment Execution Department and in the Registry of the European Court. However, such a profile might be considered somewhat surprising: Neither a judge by training nor an academic, Mr. Lobo is a pure product of the international civil service. In any case, it will be particularly interesting to follow his evolution as a judge elected in respect of Russia after a career that, *prima facie*, makes him a human rights friend. Above all, his two challengers did not win the approval of the well-informed doctrine (fn 6), suggesting that his election must be, for many, a relief.

The new Moldovan judge, on the other hand, has an academic profile – where doctorate and publications go hand in hand – in addition to experience as a trainer and then Director of the

National Institute of Justice, whose aim is to organise initial and ongoing training for judges. K. Simackova, for her part, has had a remarkable career in all respects, which began in the world of lawyers and continued in the world of the judiciary: A former judge at the Constitutional Court, but also at the Supreme Administrative Court, registered on the list of *ad hoc* judges for the Czech Republic, several of her interviews suggest that she will be particularly sensitive to the fight against stereotypes of women (see for example [here](#)). Needless to say, this will be fundamental in a body which, at the end of 2021, has only 16 women out of 47 judges. In other words, a body which does not even meet the very diplomatic percentage of 40% recommended by the Council of Europe's own bodies...

At this stage, the profile of the new arrivals is, *prima facie*, reassuring. Now, let us wait and see whether the 'duty of ingratitude' (*devoir d'ingratitude*), according to the famous formula of the former French Ministry of Justice and University Professor Robert Badinter, will characterise their mandate. In this respect, the content of their separate opinions will be a good evaluation compass.

*Laurence Burgorgue-Larsen is Professor of Law at the Sorbonne Law School (Université Paris 1).*

(fn 1) See the article by A. Drzemczewski, who was, between 2005 and 2016, Head of the Assembly's Legal Affairs and Human Rights Department, and who participated in the creation of the Committee on the Election of Judges, 'The Election of Judges to the European Court of Human Rights: An Overview of the

Procedure’, *Revista General de Derecho Europeo*, 55, 2021, pp. 76-98).

(fn 2) See [Doc. 15350](#), 23 August 2021, List and curricula vitae of the candidates proposed by the Government of the Republic of Moldova.

(fn 3) We refer in this respect to the chronicles written without concessions by professor Jean-François Flauss (*RTDH*, 1998, pp. 435-464; *RTDH*, 2001, pp. 693-713; *RTDH*, 2005, pp. 5-31; *RTDH*, 2008, pp. 713-741).

(fn 4) On the Czech case, see P. Guasti, ‘Populism in power and Democracy: Democracy Decay and

Resilience in the Czeck Republic (2013-2020)’, *Politics and Governance*, no. 4, 2020, pp. 473-480.

(fn 5) This event was reported *expressis verbis* by the French delegation to the Parliamentary Assembly, [Information report](#), 29 December 2021.

(fn 6) See K. Dzehtsiarou, Gennady Esakonv, ‘Russian Roulette? Selection of the Judicial candidates to the European Court from Russia’, *Strasbourg Observers*, 7 Dec. 2020.



**All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.**

Permission to use this content must be obtained from the copyright owner.



**EU Law Live** is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.

**Editor-in-Chief:**

Daniel Sarmiento

**Assistant Editors:**

Anjum Shabbir and Dolores Utrilla

**Editorial Board**

Maja Brkan, Marco Lamandini, Adolfo Martín, Jorge Piernas, Ana Ramalho, René Repasi, Anne-Lise Sibony, Araceli Turmo, Isabelle Van Damme and Maria Weimer.

**ISSN**

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

Subscription prices are available upon request. Please contact our sales department for further information at

**[subscriptions@eulawlive.com](mailto:subscriptions@eulawlive.com)**



stay alert | keep smart

---

EU LAW LIVE © ALL RIGHTS RESERVED

---