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Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights

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Abstract

Judges should be impartial and independent, judging based solely on the law. Current constitutional literature suggests an important factor in securing this may be the length of tenure. The assumption is that judges with non-renewable terms are more independent than judges with renewable terms since they do not have to worry about reappointment, but proving this assumption empirically is not straightforward. Obstacles include difficulties in comparing different courts and the fact that there is often no obvious case outcome that proves independence. This article aims to overcome these obstacles with a mixed-methods study on the European Court of Human Rights during a time when the tenure rules changed. The study goes beyond the counting of votes and analyses the arguments used in separate opinions as indicators of independence. Our main findings are that, after the introduction of non-renewable terms, judges write more opinions overall, and more of them criticize the judges' appointing states, while fewer defend it. We also find that judges on non-renewable terms are on average more likely to write opinions addressing violations as systemic problems and to use their opinions to provide guidance for their appointing states on implementing judgments and improving human rights protection.

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1 Introduction

> [T]here wants a known and indifferent judge, with authority to determine all differences according to the established law. For … men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's.[1]

There are many reasons to pursue judicial independence. In virtue-based theories of justice, judicial independence has a value in itself,[2] while, for the field of economics, it has been estimated that full judicial independence could increase national growth by 1.5–2.1 per cent.[3] In functionalist approaches, which are most common in constitutional law literature as well as the foundation for the Council of Europe's recommendations for member states,[4] independence is necessary to enable the judge to act impartially and ensure the right to a fair trial.[5] As such, judicial independence is not a privilege of the judges but, rather, justified to enable judges to fulfil their roles as guardians of the law.[6] In this article, we apply a similar division in which impartiality is a function of independence. When a judge is independent, he or she is not subjected to undue pressure from any outside source, including but not restricted to the parties of the case, enabling him or her to judge cases impartially – that is, without favouring either party or any particular legal reasoning favoured by an outside source. Impartiality is central to the logic of courts: a conflict is taken to a court for resolution because it is assumed that the court is impartial and will judge the case on its merits. If this is not the assumption, individuals would be better off not engaging in adjudication at all since appearing before a court is both time and resource consuming.[7] In addition to being independent and impartial, courts must also appear to be so since the court cannot fulfil its role as arbiter and resolver of conflicts if it is not perceived to be independent by all parties.[8] The European Court of Human Rights (ECtHR) has in this regard adopted the maxim from English law[9]

1 J. Locke, *Two Treatises of Government: The Works of John Locke* (1690; reprinted 1823), para. 125 ('Concerning the True Original Extent and End of Civil Government').

2 Macdonald and Kong, 'Judicial Independence as a Constitutional Virtue', in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 831, at 839.

3 Hayo and Voigt, 'Explaining De Facto Judicial Independence', 27 *International Review of Law and Economics* (2007) 269, at 270.

4 Committee of Ministers of the Council of Europe, COE Recommendation: Judges, Independence, Efficiency and Responsibilities, Doc. CM/Rec(2010)12 (2010).

5 A. Dziedzic, *Foreign Judges in the Pacific* (2021), at 131; Storme, 'Independence of the Judiciary: The European Perspective', in S. Shetreet and C. Forsyth (eds), *The Culture of Judicial Independence* (2011) 85, at 86; Guarnieri and Piana, 'Judicial Independence and the Rule of Law: Exploring the European Experience', in S. Shetreet and C. Forsyth (eds), *The Culture of Judicial Independence* (2011) 111, at 115; Committee of Ministers, *supra* note 4, paras 3–11.

6 G.N. Modona *et al.*, Report on the Independence of the Judicial System, Part I: The Independence of Judges, Venice Commission Report CDL-AD(2010)004 (2010), at 3.

7 Molbæk-Steensig and Quemy, 'AI and the Right to a Fair Trial' in A. Quintavalla and J. Temperman (eds), *AI and Human Rights* (2023) 265.

8 Department for the Execution of Judgments of the ECtHR, Independence and Impartiality of the Judicial System: Thematic Factsheet (2020).

9 *Rex v. Sussex Justices Ex Parte McCarthy* (KB 1), 256 (9 November 1923), Hewart CJ.

that '[j]ustice must not only be done, it must also be seen to be done' in its case law.[10]

Given the importance of independence of the judiciary, constitutional as well as international law have a long history of legislating to ensure it. Many international documents issuing recommendations for judicial independence function as a checklist of issues that may impact the independence of a judge.[11] In the United Nations' basic principles as well as the Council of Europe's recommendations, these principles include a generalized demand for protection against unwarranted inference by non-judicial bodies,[12] a requirement to secure training[13] and the salary of the judge,[14] adequate resources and administrative support.[15] Securing respect for judge tenure is another element in these recommendations, with unlimited tenure and non-renewable terms being preferred but not required in respect for different constitutional traditions.[16] The logic of preferring non-renewable terms to renewable ones is to limit the pressure on judges to please the re-appointing authority, which may be part of the executive or legislative branch of government, while life tenure should also prevent pressure on judges to consider future employability when adjudicating.[17] In this article, we set out to test empirically one such theoretical assumption about judicial independence – namely, that a change from renewable to non-renewable terms increases judicial independence with regard to the appointing authority. We do this by exploiting a natural experiment at the ECtHR, which in 2010 changed judge tenure from renewable six-year terms to non-renewable nine-year terms.

A related theme, which is equally important to impartiality but which this article will not be addressing in detail, is independence from the applicant party. At the ECtHR, judges are required to recuse themselves in situations where their independence may legitimately be called into question due to their personal or professional relationships, previous engagement with the case or publicly expressed opinions.[18] In 2020, a debate emerged in this regard as the European Centre for Law and Justice (ECLJ), a non-governmental organization (NGO) often critical of the ECtHR, published a report on ECtHR judges who had formerly been connected to NGOs involved

[10] ECtHR, *Sigríður Elín Sigfúsdóttir v. Iceland*, Appl. no. 41382/17, Judgment of 25 February 2020. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

[11] Macdonald and Kong, *supra* note 2, at 835; Dziedzic, *supra* note 5, at 135.

[12] Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, Resolutions 40/32 and 40/146 (1985), Art. 4; Committee of Ministers, *supra* note 4, para. 12.

[13] Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, Art. 9–10; Committee of Ministers, *supra* note 4, paras 56–57.

[14] Committee of Ministers, *supra* note 4, paras 53–55; Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, Art. 11.

[15] Committee of Ministers, *supra* note 4, paras 30–38; Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, Art. 7.

[16] Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 12, Art. 12; Committee of Ministers, *supra* note 4, paras 49–51.

[17] Melton and Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence', 2 *Journal of Law and Courts* (2014) 187, at 196.

[18] Rules of Court (Plenary Court, Strasbourg) (2019), Rule 28.

in litigation at the Court. The report claimed that such judges did not recuse themselves often enough. The organization also started a collection of signatures stating that judges with previous NGO experience ought not to be elected for office at all. The report was heavily criticized for both factual errors and bias in its presentation of data, including ignoring the potentially equivalent professional relationships that a former civil servant judge might harbour.[19] Since the judge's relationship with the state is built into the very way in which the convention system is set up, and is current rather than past, this article investigates that relationship rather than the rare and contested occasions in which a prior relationship with an applicant organization might have an influence if the judge does not recuse themselves.

In section [2], we situate this article in the existing literature on judicial independence; in section [3], we elaborate on the context of the ECtHR and Protocol no. 14; in section [4], we explain our mixed-methods approach and hypotheses; in section [5], we present the analysis and results; and, finally, we conclude and discuss the limitations of the study.

2 Previous Studies on Judicial Independence

Although there are many different constitutional traditions with regard to securing judicial independence,[20] the aim is a common one with a strong global push behind it.[21] A rich comparative literature has emerged that ventures to determine whether these recognized de jure measures for ensuring judicial independence are efficient in insuring de facto judicial impartiality. The question is an exceedingly difficult one to research because there is no consensus on how to measure independence and impartiality.[22] Judicial independence does not mean that judges decide in accordance with their personal opinions but, rather, that they are free to decide impartially, based on the law, without interference from anyone else's personal opinions or vested interests.[23] Therefore, we cannot use data from attitudinal model studies to determine whether judges are independent and impartial. Furthermore, those studies may be tainted by external pressures, and judges could also be aiming to please constituencies by judging politically.[24] Determining whether decisions have been made solely based

[19] G. Puppinck, 'NGOs and Judges at the ECtHR: A Need for Clarification', *EJIL:Talk!* (5 March 2020); M. Scheinin, 'NGOs and ECtHR Judges: A Clarification', *EJIL:Talk!* (13 March 2020).

[20] Melton and Ginsburg, *supra* note 17, at 194–195.

[21] In addition to the Basic Principles and the Council of Europe's recommendations, the standards adopted by the International Association of Judicial Independence and World Peace are often referenced in the literature and go into more detail with regard to how to ensure the personal independence of judges. See International Association of Judicial Independence and World Peace, Mt. Scopus International Standards of Judicial Independence (2018).

[22] Rosenn, 'The Protection of Judicial Independence in Latin America', 19 *University of Miami Inter-American Law Review* (1987) 1, at 9–12.

[23] Committee of Ministers, *supra* note 4, para. 11.

[24] Huber and Gordon, 'Accountability and Coercion: Is Justice Blind When It Runs for Office?', 48 *American Journal of Political Science* (2004) 247, at 261–262; J. A. Segal and H. J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002).

on the law is also not always straightforward. Often legal questions will be novel to some degree and the judge will be left a measure of discretion to decide between several ways in which the law or the facts could be interpreted. The literature on how judges ought to interpret in such situations is vast and varied,[25] and there is a vivid debate on how judicial independence interacts with judge accountability.[26]

For literature aiming to measure judicial independence, this creates the problem that, because we do not have any objective measure of how a decision ought to have turned out if it were decided by an impartial judge, we cannot reliably compare anything to the actual outcome. Some strands of literature get around this by relying on composite measures of de facto judicial independence,[27] but these composite scores often include measurements that are at best only indirectly relevant and at worst misleading.[28] In many ways, such studies say very little about the independence of the individual judge or court as such and instead make a more generalized contribution comparing de jure measures to ensure independence with general levels of rule of law and adherence to good governance. While interesting on their own terms, these studies do not help answer our questions about how measures to ensure independence translate into behaviour at the court.

In this article, our aim is therefore narrower: we are specifically interested in whether the conditions of judicial terms on their own affect judicial behaviour with the potential to change case law outcomes. In doing this, we aim to contribute to another strand of literature – namely, on what may motivate judges when adjudicating. This literature has long been dominated by the principal-agent and strategic approaches to modelling judge behaviour. Such models use economy and social science modelling, assuming that judges and institutions are rational actors that 'maximise utility'.[29] Such utility maximizing may show itself as responsible bodies being strategic when

[25] Bates, 'Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career ... Its 'Coming of Age'?', 36 *Human Rights Law Journal* (*HRLJ*) (2016) 261; Sartori, 'Gap-Filling and Judicial Activism in the Case Law of the ECtHR', 29 *Tulane European and Civil Law Forum* (2014) 47; Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the ECtHR', 42 *Creighton Law Review* (2008) 361; Mahoney, 'Judicial Activism and Judicial Self-Restraint in the ECtHR: Two Sides of the Same Coin', 11 *HRLJ* (1990) 57.

[26] Rosenn, *supra* note 22, at 3; Crawford and McIntyre, 'Judicial Independence in International Law and National Law: The Independence and Impartiality of the "International Judiciary"', in S. Shetreet and C. Forsyth, *The Culture of Judicial Independence* (2012) 187, at 199; Schwarzschild, 'Judicial Independence and Judicial Hubris', in Shetreet and Forsyth, *ibid.*, 177, at 179.

[27] Hayo and Voigt, *supra* note 3; Linzer and Staton, 'A Global Measure of Judicial Independence, 1948–2012', 3 *Journal of Law and Courts* (2015) 223; Melton and Ginsburg, *supra* note 17.

[28] See Ríos-Figueroa and Staton, 'An Evaluation of Cross-national Measures of Judicial Independence', 30 *Journal of Law, Economics and Organization* (2014) 104, who review several such measures, including the national economic score by Clague *et al.*, 'Contract-intensive Money: Contract Enforcement, Property Rights, and Economic Performance', 4 *Journal of Economic Growth* (1999) 185 (which was not designed to review judicial independence at all. Many other scores rely on expert panel data which though often illuminating may also create a false sense of mathematical certainty).

[29] Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', 3 *Supreme Court Economic Review* (1993) 1, at 3.

selecting judges[30] or as judges casting their votes strategically to increase the power, reach or legitimacy of their courts,[31] to improve their own status and career[32] or to get re-elected if serving a renewable term.[33] The field of law has generally been wary of such models as they tend to ignore the law and legal reasoning almost entirely or treat it merely as restraints on rational behaviour.[34] In this article, we investigate the motivations for judges to give separate opinions and specifically whether career-based pressures in the form of renewable terms of tenure act as restraints on the practice of writing separate opinions criticizing the appointing state and/or motivate the writing of opinions that defend the home state. As such, we are assuming the pull of the law implicitly since, as will be elaborated below, other studies have shown that the most common type of separate opinion is one that aims to 'get the judgment just right', and we are instead treating political pressure as a potential restraint on this motivation. Like Chris Hanretty, we assume that 'such claims can only be tested in the aggregate' due to the heterogeneous nature of case law,[35] especially at high courts such as the ECtHR.

Several studies on the ECtHR investigating adjacent claims have already been carried out. In 2008, for example, Erik Voeten found that, while judges at the ECtHR most often vote with the majority, judges representing the respondent states were twice as likely as other judges (15.8 per cent versus 7.7 per cent) to vote in favour of the respondent state when the majority was against and about four times less likely than other judges to vote against the respondent state when the majority was for (4.7 per cent versus 19.4 per cent).[36] In 2022, however, Øyvind Stiansen found that this tendency had changed. As in this article, Stiansen took advantage of the natural experiment that occurred at the ECtHR when in 2010 Protocol no. 14 changed judge

[30] Voeten, 'The Politics of International Judicial Appointments: Evidence from the ECtHR', 61 *International Organization* (2007) 669; Elsig and Pollack, 'Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization', 20 *European Journal of International Relations* (2014) 391.

[31] Graham, 'Strategic Admissibility Decisions in the ECtHR', 69 *International and Comparative Law Quarterly* (*ICLQ*) (2020) 79; Hermansen, 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union', 27 *Journal of European Public Policy* (2020) 1215; Dothan, 'Judicial Tactics in the ECtHR', 12 *Chicago Journal of International Law* (2011) 115; Zwart, 'More Human Rights Than Court: Why the Legitimacy of the ECtHR Is in Need of Repair and How It Can Be Done', in S. Flogaitis, J. Fraser and T. Zwart (eds), *The ECtHR and Its Discontents: Turning Criticism into Strength* (2013) 71; Stiansen and Voeten, 'Backlash and Judicial Restraint: Evidence from the ECtHR', 64 *International Studies Quarterly* (2020) 770.

[32] Pérez-Liñán *et al*., 'Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts', 68 *Journal of Politics* (2006) 284.

[33] Canes-Wrone *et al*., 'Judicial Selection and Death Penalty Decisions', 108 *American Political Science Review* (*APSR*) (2014) 23; Huber and Gordon, *supra* note 24.

[34] J. Goldsmith and A. Vermeule, 'Empirical Methodology and Legal Scholarship', 69 *University of Chicago Law Review* (2002) 153, at 154.

[35] C. Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (2020), at 38.

[36] Voeten, 'The Impartiality of International Judges: Evidence from the ECtHR', 102 *APSR* (2008) 417, at 425.

tenures from renewable to non-renewable terms.[37] Studying the votes cast by judges before and after 2010, he found that the tendency for national judges to find in favour of the state in split votes more often than non-national judges diminished significantly after 2010, henceforth resembling the vote tendencies of the non-national judges to a much greater degree.[38] When considered together with other factors that might indicate the relative dependency that the judge might have with the appointing authority, the result was further corroborated – for example, younger judges who have more to lose career-wise from non-renewal were more affected by the change than older judges.[39] Though fascinating, the literature mapping the votes of judges as an indicator of independence has two important limitations. The first is the previously defined lack of a baseline – that is, the lack of a clear indicator of what the ideal independent vote based solely on legal concerns would be notwithstanding strategy. The principal-agent or strategic model in this regard carries a particular risk of ignoring non-strategic reasons for differences in voting patterns, including general case law developments, human rights improvements or deterioration within a state and differences between states. The second is the absence of attention to the fact that legal arguments and interpretation used in judgments often have more far-reaching consequences for policy decisions and future case law than the final violation or non-violation outcome of the individual case or vote.

The importance of interpretation is especially prominent for international courts tasked with creating a whole new body of case law influencing future judgments and other international courts alike.[40] One example of this from the ECtHR is the key case *M.A. v. Denmark*, which involved the right to family life for a Syrian refugee who had been subjected to a three-year waiting period before being allowed to apply for family reunification with his wife. The Grand Chamber found by 16 votes to one a violation of Article 8 of the European Convention on Human Rights (ECHR).[41] If we look only at the votes in this case, the state would thus appear to have lost, and even Denmark's national judge, Jon Kjølbro, did not dissent, even though Kjølbro has been tagged in the literature as one of the judges more likely in general to find in favour of respondent states.[42] A closer look at the legal argumentation, however, shows a high degree of state deference. Though finding a three-year wait to be excessive and a violation of Article 8, the Court stated that it saw no reason to question the rationale of a waiting period in general. Furthermore, it found that a two-year wait, as allowed in

[37] Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms 13 May 2014, ETS 194. Entered into force 1 June 2010.

[38] Stiansen, '(Non) Renewable Terms and Judicial Independence in the ECtHR', 84 *Journal of Politics* (2022) 1, at 10.

[39] *Ibid.*, at 11.

[40] J. Viljanen, 'The ECtHR as a Developer of the General Doctrines of Human Rights Law: A Study of the Limitation Clauses of the European Convention on Human Rights' (2003) (PhD thesis on file at University of Tampere), at 264; Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights', 15 *International Journal of Constitutional Law* (2017) 359.

[41] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.

[42] Stiansen, *supra* note 38, at 5; Stiansen and Voeten, *supra* note 31, at 777.

the European Union's (EU) Family Reunification Directive, would be within the margin of discretion of the state.[43] In other words, the Court accepted the practice of subjecting refugees to a waiting period before they can also apply for family reunification after they have received asylum – a practice that was considered controversial only a few years earlier.[44]

The details of interpretation and argumentation are even more important for separate opinions, from which the knowledge about split votes of the individual judges is taken. National judges at the ECtHR can play an important role in providing guidance to states on how to implement a judgment, and their voices may carry greater legitimacy in the home state than the voices of other judges. The arguments used in such separate opinions are therefore just as important as the votes cast. Another limitation to vote-counting studies is the ambiguity that is inherent in many judgments that often deal with more than one issue. At the ECtHR, for instance, a single case may have different voting patterns for conclusions on different articles or even for different aspects of the same article. This makes it an ambiguous and a qualitative assessment to determine whether an individual dissenting opinion is actually advocating for a more stringent or more deferent application of the convention. In certain cases, it may even do both.[45] This article therefore employs an analysis that (i) counts a binary determination of whether an opinion is suggesting more or less deference to the state and (ii) conducts a detailed, structured doctrinal study of all the cases in which the national judge has delivered a separate opinion in respect of their home state. To the best of our knowledge, this is the first time such a study has been undertaken.

With respect to separate opinions, not all courts allow them, and none to our knowledge formally require them, but the practice of giving separate opinions is more widespread in common law jurisdictions than in civil law ones. In Matthew Hall's psychology-based study of the separate opinions of American judges, he found that many were initiated by a conscientious need to 'get the judgment just right', while other opinions were motivated by an effort to reduce the impact of the case or to provide clues to litigants on how to win future cases.[46] Interviews and studies of the ECtHR judges reveal similar motivations, such as providing the best solution to an individual case[47] and changing the general direction of case law on a particular topic[48] or article.[49] A common type of separate opinion at the ECtHR is one concerned with the

[43] ECtHR (Grand Chamber), *M.A. v. Denmark*, Appl. no. 6697/18, Judgment of 9 July 2021, paras 161–162; Council Directive (EC) 2003/86 on the right to family reunification, OJ 2003 L 251.

[44] Gammeltoft-Hansen and Madsen, 'The Limits of Indirect Deterrence of Asylum Seekers', *Verfassungsblog* (2021); Molbæk-Steensig, 'How to Deal with Really Good Bad-Faith Interpreters: *MA v Denmark*', 37 *Utrecht Journal of International and European Law* (2022) 59.

[45] White and Boussiakou, 'Separate Opinions in the ECtHR', 9 *Human Rights Law Review* (2009) 37, at 49.

[46] M.E.K. Hall, *What Justices Want: Goals and Personality on the U.S. Supreme Court* (2018), at 131–133.

[47] Judge Zupančič (interviewed in Bruinsma), 'Judicial Identities in the European Court of Human Rights', in A. van Hoek *et al.* (eds), *Multilevel Governance in Enforcement and Adjudication* (2006) 203, at 218.

[48] For example, on reparations, as discussed by Judge Bonello in an interview cited in van Hoek *et al.*, *supra* note 47, at 220.

[49] See, e.g., Tulkins, Casadevall and Thomassen, who have written several opinions on Article 6. See *ibid.*, at 228.

coherence and consistency of the Court's body of case law as a whole. Albanian Judge Darian Pavli's dissent in *Sigurður Einarsson and Others v. Iceland* is an example of just that. It decried that the majority had failed to apply existing principles established by precedent, concluding that 'the judgment does a disservice to the clarity and consistency of our case law'.[50] Coherence arguments can also work in the opposite direction, however. One such example is Georgian Judge Nona Tsotsoria's opinion in *Becker v. Norway*, which argued that the majority should not have applied principles derived from other cases since 'applying Convention principles developed under other circumstances, without explanation or context, does no good either to the consistency of the case-law or in general, the protection of freedom of expression'.[51]

Another type of separate opinion may be those suggested by Laurence Helfer and Erik Voeten to be 'walking back dissents' – that is, separate opinions, dissenting and concurring, that tend to favour the respondent state and argue that the ECtHR case law has moved in too activist a direction.[52] The conclusions of this particular article were questioned by Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, leading to a prolonged debate on the methodological ambiguity in qualitative coding of judgments and separate opinions.[53] Certain methodological aspects of that debate will briefly be revisited in the methodology section. With regard to the normative reasoning in favour or against separate opinions, advocates argue that both the opinions themselves and the risk of them contribute to better reasoning and more careful deliberation, including making it harder for national judges to simply vote as their home state would prefer.[54] In contrast, an argument against their usage is that they may limit the authority of the court and its ability to speak with one voice.[55] Studies that only count the votes and ignore the interpretation miss out on these important nuances. On the other hand, many traditional legal analyses rely on inconsistent sampling of cases and opinions, making comparisons over time difficult and unreliable. In this article, we aim to include the best of the two approaches by combining a big-data approach, assisted by artificial intelligence to identify a complete set of judgments where the national judge has given a separate opinion, with a structured and in-depth

[50] ECtHR, *Sigurður Einarsson and Others v. Iceland*, Appl. no. 39757/15, Judgment of 4 June 2019.

[51] ECtHR, *Becker v. Norway*, Appl. no. 21272/12, Judgment of 5 October 2017.

[52] Helfer and Voeten, 'Walking Back Human Rights in Europe?', 31 *European Journal of International Law* (*EJIL*) (2020) 797.

[53] Stone Sweet *et al*., 'Walking Back Dissents: A Reply to Helfer and Voeten', 32 *EJIL* (2021) 897; Helfer and Voeten, 'Walking Back Dissents on the ECtHR: A Rejoinder to Alec Stone Sweet, Wayne Sandholtz and Mads Andenas', 32 *EJIL* (2021) 907; A. Stone Sweet *et al*., 'Walking Back Dissents: A Reply to Helfer and Voeten', *EJIL:Talk!* (9 December 2021).

[54] Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication', 14 *ICLQ* (1965) 788, at 792; Schauer, 'Giving Reasons', 47 *Stanford Law Review* (1995) 633; Paulus, 'Judgments and Separate Opinions: Complementarity and Tensions', in G. Raimondi (ed.), *Dialogue between Judges: Strengthening Confidence in the Judiciary* (2019) 25, at 27.

[55] Naurin and Stiansen, 'The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary', 53 *Comparative Political Studies* (2020) 959; Skouris, 'Judging at the Court of Justice of the European Union: Is There a Need for Dissenting Opinions?', in K. Lenaerts *et al*. (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (2019) 99.

doctrinal analysis and manual coding. This approach will be explained in further detail in section [4].

3 The European Court of Human Rights

Human rights are a particularly delicate field of law when it comes to ensuring the independence of judges. Cases often deal with the rights of ostracized individuals such as members of unpopular minorities,[56] individuals who have committed crimes[57] or individuals who use their freedoms – for example, freedom of expression – in ways that are uncomfortable to others.[58] In some of these cases, there may be a popular pressure in the state to find against the applicant even when the latter's rights have been violated. In such situations, a supranational court such as the ECtHR is further removed from that popular pressure than a national court and, presumably, more likely to make that legal determination impartially. At the same time, human rights questions permeate all manner of administrative and political decisions, and often a delicate balancing act must be undertaken between the rights of several different individuals[59] or between the rights of the individual and other important collective interests.[60] In some such cases, that balancing may need informing by national culture, priorities and other specificities.

The way in which the ECtHR has ventured to bridge this dilemma is by including a judge from the appointing state on the bench (the national judge) when judging in chambers.[61] The national judge may then act as an assurance that important national

[56] Such as Burqa-wearing women: ECtHR (Grand Chamber), *S.A.S v. France*, Appl. no. 43835/11, Judgment of 1 July 2014; travelling Roma families: ECtHR (Grand Chamber), *Chapman v. United Kingdom*, Appl. no. 27238/95, Judgment of 18 January 2001; or transgendered persons: ECtHR (Grand Chamber), *Christine Goodwin v United Kingdom*, Appl. 28957/95, Judgment of 11 July 2002.

[57] Such as heroin-addicted prisoners: ECtHR, *Wenner v. Germany*, Appl. no. 62303/13, Judgment of 1 September 2016; convicted paedophiles: ECtHR, *Tim Henrik Bruun Hansen v. Denmark*, Appl. no. 51072/15, Judgment of 9 July 2019; gang members: ECtHR, *Levakovic v. Denmark*, Appl. no. 7841/14, Judgment of 28 October 2018; or members of the Mafia: ECtHR (Plenary Court), *Guzzardi Case*, Appl. no. 7367/76, Judgment of 6 November 1980.

[58] Such as publishers of schoolbooks with explicit sex education: ECtHR, *Handyside v. United Kingdom*, Appl. no. 5493/72, Judgment of 7 December 1976.

[59] Such as between the private lives of a person wishing to know the identity of their biological parents and the biological mother wishing to remain anonymous: ECtHR, *Odièvre v. France*, Appl. no. 42326/98, Judgment of 13 February 2003; or cases where the private life of an individual may crash with the freedom of expression of another: ECtHR, *Von Hannover v. Germany*, Appl. no. 59320/00, Judgment of 7 February 2004.

[60] Of, for example, national security: ECtHR (Grand Chamber), *Goodwin v. United Kingdom*, Appl. no. 17488/90, Judgment of 27 March 1996; ECtHR, *Big Brother Watch and Others v. United Kingdom*, Appl. 58170/13, 62322/14, 24960/15, Judgment of 13 September 2018; or public investment: ECtHR (Grand Chamber), *Scordino v. Italy (no. 1)*, Appl. no. 36813/97, Judgment of 29 March 2006; ECtHR (Grand Chamber), *The Former King of Greece and Others v. Greece*, Appl. no. 25701/94, Judgment of 23 November 2000.

[61] In Chambers and the Grand Chamber. In three-judge committees, which take only unanimous decisions, the national judge can be invited to replace a member in situations where this is deemed necessary. ECHR, *supra* note 41, Art. 28(3). Single judge formations are never the national judge (Art. 26(3)).

customs and specificities are considered, but if their allegiance is unreasonably aligned with their appointing state, the other non-national judges will have the majority to overrule them. Former president of the Court, Judge Luzius Wildhaber, has noted that judges might well tend to be more tolerant towards their home jurisdictions, not because of a dependency or allegiance as such but, rather, because '[y]ou know your own system, you know it works and you think it hasn't led to many abuses. Even as a very objective observer you may be more lenient towards your own country'.[62] In this article, we will leave aside the question of whether there exists a reasonable level of additional deference for the national judge and focus instead on the relative change between two periods in the case law of the ECtHR – namely, 1998–2010, during which the term for judges was a renewable six years, and 2010–2021, during which the term was a non-renewable nine years. While it is a contested normative question whether such leniency due to familiarity and perspective is the same as a lack of independence and one deeply intertwined with the debate on the optimal level of activism and restraint on the part of human rights judges,[63] it is not controversial to maintain that such leniency towards the home state ought not to be motivated by financial or career prospects, including that of attempting to ensure reappointment. Since we are not comparing national judges with non-national judges but, rather, national judges in two different periods when the judicial terms were different, it isolates the effect of term renewability as a factor in the behaviour of national judges.

There are examples of judges from the ECtHR who appear not to have been appointed for a second term for failing to support the government in important cases.[64] Voeten lists three examples, which we briefly examine: the Bulgarian judge Dimitar Gochev, who left the Court in 1998; the Moldovian judge Tudor Pantiru, who left the Court in 2001; and the Slovakian judge Viera Strážnická, who left in 2004.[65] In all three cases, there was a change of national leadership leading up to the decision not to renew these judges, but it is not obvious whether the judges' careers have suffered in the long term. Gochev, the Bulgarian judge, appears to have returned to his position as constitutional judge after his term ended in 1998, and he was later elected, under a new government, as a judge to the International Criminal Court.[66] Pantiru's position appears to be a more contentious case, as he did not return to Moldova upon the end of his term. He stayed instead in international adjudication, first as a legal advisor in the Council of Europe and later as an international judge in the Constitutional and Supreme Courts of first Bosnia and Herzegovina and later Kosovo. He also spent a few

[62] Judge Zupančič, *supra* note 47; Parmentier, 'Interview with Mr. Luzius Wildhaber, President of the ECHR', 21 *Netherlands Quarterly of Human Rights* (*NQHR*) (2003) 185, at 187.

[63] Sartori, *supra* note 25, at 30; Mahoney, *supra* note 25, at 59; Storme, *supra* note 5, at 89; Schwarzschild, *supra* note 26, at 185.

[64] Lemmens, '(S)electing Judges for Strasbourg: A (Dis)appointing Process?', in M. Bobek (ed.) *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015) 95, at 99–100.

[65] Voeten, *supra* note 36, at 421.

[66] International Criminal Court, Election of the Judges of the International Criminal Court: Annex I Alphabetical List of Candidates (with Statements of Qualifications), Doc. ICC-ASP/1/4/Add.1, 3–7 February 2003 and 21–23 April 2003, at 77–79.

years as a parliamentarian for the Social Democrats in Romania, and, only in 2013, after the Communists lost power in Moldova, did he return to Moldova as a judge of the Constitutional Court.[67] Strážnická is reported to have protested the Slovak government's decision not to renew her mandate, and the subcommittee on the election of judges to the ECtHR also rejected the Slovak government's first list of candidates for not containing any female names.[68] She did not return to judging after the end of her ECtHR term but instead became a university professor.[69] Another case is the Norwegian judge Hanne Sophie Greve, who publicly stated that she would not seek a second term.[70] Similarly, the Dutch judge Wilhelmina Thomassen was not renewed after her six-year term ending in 2004, but there are no indicators in interviews or in the progression of her academic and professional work afterwards that the non-renewal was not her choice.[71] Due to the many factors entering into consideration for judges' careers and decisions on whether to speak out publicly if non-renewal was not the judge's choice, determining the degree of pressure issued by reappointment procedures remains difficult. Nonetheless, the concern that the renewability of terms could put pressure on both the actual and the perceived independence of the ECtHR has been explicated at least since the report of the Evaluation Group in 2001, a preliminary report for the negotiations of Protocol no. 14 and the Interlaken process.[72]

The ECtHR has a long history of reform, including changing the tenures of the judges. In 1950, when the ECHR came into force, it specified electing members of the Commission for six years[73] and judges for the Court for nine years. Both types of terms were renewable and ad hoc rather than full time, with judges keeping their positions in their home jurisdictions or universities. With the aim of having commissioners and judges exchanged on a rolling basis, some of these first appointees would be up for replacement after three (for commissioners), four or six years (for judges), as determined by the drawing of lots.[74] By 1966, the Committee of Ministers had drafted Protocol no. 5, which had the purpose of ensuring a more regular exchange of judges every three years, like the commissioners, amending the ECHR to allow judges to be appointed for renewable terms of six, nine or 12 years.[75] The long renewable terms led

[67] Moldova Constitutional Court, 'Constitutional Judges: Tudor Pantiru' (2013) http://new.constcourt.md/pageview.php?l=en&id=563&idc=18&t=/Composition-and-organization/Constitutional-judges/Tudor-PANIRU/.

[68] Voeten, *supra* note 36, at 421; Pasquier, 'Les combats de Viera', *L'Express* (4 May 2004) www.lexpress.fr/actualite/monde/europe/les-combats-de-viera_490069.html; K. McNamara, Report on the Election of Judges to the ECtHR Following the Expiry of the Terms of Office of One Half of the Judges (2004), at 4.

[69] Gašparovič, 'The President of the Slovak Republic Appointed University Professors' (2005) https://archiv.prezident.sk/gasparovic/indexfc5d.html?rok-2005&news_id=1023>.

[70] Libell, 'Greves blikk på norsk rettsvesen – Vi har noen store utfordringer i årene som kommer', 5(46) *Jurist Kontakt* (2012), at 6–10.

[71] Thomassen, 'Six Years as a Judge in the ECtHR 1998/2004: Highlights and Frustrations', 22 *NQHR* (2004) 675, at 686.

[72] J. Harman, Report of the Evaluation Group to the Committee of Ministers on the ECtHR (2001), para. 89.

[73] Council of Europe, Archived Version of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art. 22.

[74] *Ibid.*, Art. 40.

[75] Protocol no. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1966, ETS 55, 20 January 1966, Art. 3.

to some judges spending decades on the bench. The Turkish judge Feyyaz Gölcüklü, for example, held his position for 21 years, while the French judge Stefano Pittiti and the Slovenian judge Boštjan Zupančič each spent 18 years at the Court. According to commentators at the time, the drafters of Protocol no. 11 believed that these stays would be too long outside the national legal order after 1998, since after 1998 judges would be stationed in Strasbourg working full time rather than ad hoc whilst keeping their positions in their national systems.[76] As a result, Protocol no. 11, which contained a major overhaul of the Convention system, abolishing the Commission and transforming the Court into the full-time permanent institution we know today, also contained a provision reducing judge tenure to a renewable term of just six years. In 2010, Protocol no. 14 increased the tenure to nine years but abolished the option of re-election.[77] At the time of writing, no official steps have been taken to make additional changes, but concerns have been raised that the nine-year term may be too short to ensure adequate consistency and continuity at the Court.[78]

The procedure for renewing a judge before 2010 was identical to the procedure for selecting one. In all cases, the high contracting party delivered a list of three candidates along with their curriculum vitae, from which the Parliamentary Assembly elected one candidate.[79] If a government did not want to renew the sitting judge, they would simply not include him or her on the list, without having to explain why. In principle, there was no indication that a judge could be renewed only once. Throughout the period and beyond, efforts have been made to improve and streamline the selection process. From 1998 onwards, states have been requested to deliver the list of candidates in alphabetical order containing candidates of both sexes. The Parliamentary Assembly has also set up a subcommittee for interviewing candidates and giving an advisory opinion on which of the three candidates it deems to be the most qualified.[80] Requests for states to ensure representativeness and that all three candidates have the necessary qualifications have been reiterated often, and, since 2004, the Parliamentary Assembly has reserved the right not to consider lists of candidates where both sexes were not represented or where the candidates were considered to lack the necessary competences or language skills.[81] There has thus been a movement in the Parliamentary Assembly towards making the process more meritocratic and less political, but the high contracting parties retain the right to pick out

[76] Klerk, 'Protocol no. 11 to the European Convention for Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR', 14 *NQHR* (1996) 35, at 38; Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1994, ETS 155.

[77] Protocol no. 14, *supra* note 37, Art. 2.

[78] R. Spano and M. R. Madsen, *Nine Years at the Court: Interview with President of the ECtHR Robert Spano* (2022).

[79] Committee on Legal Affairs and Human Rights and Sub-committee on the Election of Judges to the ECtHR, Procedure for Electing Judges to the ECtHR (2003), at 1–2.

[80] Parliamentary Assembly of the Council of Europe (PACE), Resolution 1082 (1996): Procedure for Examining Candidatures for the Election of Judges to the ECtHR (1996), paras 4–5; PACE, Recommendation 1429 (1999): National Procedures for Nominating Candidates for Election to the ECtHR (1999).

[81] PACE, Recommendation 1649 (2004): Candidates for the ECtHR (2004).

their candidates through any procedure they prefer. There has been continued critique in the recommendations and resolutions by the Parliamentary Assembly and its various committees as well as in academic literature that the candidates proposed by the high contracting parties were on several occasions not the most qualified, lacking experience and knowledge about public international law and the necessary language skills to work at the Court, and that the procedures at the ECtHR were incapable of addressing this problem.[82] Movement towards a more merits-based procedure has been slow – and deliberately so – because the ECHR from the outset provides for a political process. Former judge Koen Lemmens describes the appointment process as a unique mix of meritocracy and democracy with which the high contracting parties are unlikely to be willing to part.[83]

These phases in the ECtHR's history mean that the Court before Protocol no. 11 in 1998 is hardly comparable with the Court after, but it also means that there was a distinct change in 2010 in the renewability and length of judge tenure, without there also being a change from ad hoc to full-time positions since that had already taken place in 1998. For this reason, we have picked two phases to compare: 1998–2010 and 2010–2021. The two periods are of equal length, and, in each period, the Court issued just above 11,000 judgments, but the number of judgments containing at least one separate opinion increased by more than a quarter. The judgments in the 2010–2021 period also represent more individual applications as the Court increased its practice of bundling applications on similar themes together.[84] Both Protocol no. 11, which initiated the full-time Court, and Protocol no. 14, which initiated our second period of study, were created mainly to enable the Court to increase its output and battle its growing backlog,[85] and both protocols succeeded in this goal in the sense that the post-2010 judgments represent more applications and the procedure for declaring applications inadmissible became more efficient. When Protocol no. 14 also changed judge tenures from renewable to fixed terms, it was following a recommendation from the Parliamentary Assembly.[86] Specifically, the explanatory report to Protocol no. 14 stated that '[t]he judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality'.[87]

[82] Steering Committee for Human Rights (CDDH), Report on the Process of Selection and Election of Judges of the ECtHR, Doc. CDDH(2017)R88addI (2017), paras 5–7; Kosař, 'Selecting Strasbourg Judges: A Critique', in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015) 120.

[83] Lemmens, *supra* note 64, at 118.

[84] Department for the Execution of Judgments of the European Court of Human Rights, Statistics on Pending Cases and Executions: Overview 1959–2021 (2021). The yearly statistics of applications available at www.echr.coe.int/Pages/home.aspx?p=reports&c=. See also the appendix for an overview of how the number of applications per judgment has increased.

[85] Molbæk-Steensig, 'The Copenhagen Declaration: Wrapping Up the Interlaken Reform?', in S. Schiedermair *et al*. (eds), *Theory and Practice of the European Convention on Human Rights* (2022) 55.

[86] PACE, Recommendation 1649, *supra* note 81, paras 9, 13.

[87] Council of Europe, Explanatory Report to Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (2004), para. 50.

It is thus clear that the reason for changing the tenure of judges was to improve their real and perceived independence and impartiality, and what we are aiming to do with this article is to test whether this goal was achieved. For the purposes of studies like this one, however, which uses the changes brought on by Protocol no. 14, it is important to keep in mind that judicial independence was only a secondary aim of the protocol – its main purpose was to increase the efficiency of the Court.[88] The protocol restructured the Court to allow single judges to decide on clearly inadmissible cases and three-judge committees to decide on cases with well-established case law. This efficiency focus became particularly evident when Protocol no. 14bis was enacted in response to Protocol no. 14 not coming into force because Russia failed to ratify.[89] In addition to changing the setup of the Court, Protocol no. 14 also included a new admissibility criterion on 'significant disadvantage', aiming at ridding the Court of cases deemed to be of little importance.[90] For studies on the changes in 2010, this means that not all changes in the case law can be attributed to an increased independence of judges. For example, inadmissibility decisions taken by single judge formations are not published in the Court's database HUDOC, which means that without any change in adjudicative practices, the percentage of judgments ending with a violation-decision in HUDOC would likely go up after 2010. Most such violation decisions are decided by three-judge committees. This should not present a problem for this study, however, since we have focused exclusively on cases that contain separate opinions, and judges do not deliver separate opinions in committee cases nor when they sit in single-judge formations.

Something that might interfere with our study, however, is whether the changes to judge-appointment procedures that were also part of Protocol no. 14 have changed what kind of judges are appointed to the Court. Debates surrounding Protocol no. 14 and parliamentary resolutions[91] have urged the high contracting parties to take gender balance and language skills into consideration and to alphabetize, rather than prioritize, when presenting their lists of judge candidates to the Parliamentary Assembly. However, in the end, Protocol no. 14 did not include provisions formally requiring either suggestion.[92] Despite the lack of legal changes to the appointment procedure, the judges selected may still have changed. States may have taken the advice onboard

88 *Ibid.*, para. 7.

89 Protocol 14bis allowed the parts of Protocol no. 14 that established the new formations to come into force only for ratifying states as there was an urgent need to improve the capacity of the Court, which at the time was battling a backlog of more than 100,000 cases. Shortly after the coming into force of Protocol no. 14bis, Russia ratified Protocol no. 14, which then came into force in 2010. See Protocol no. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms 2009, ETS 204; Council of Europe, Explanatory Report to Protocol no. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (2009), para. 1; Herrera, 'SOS ECtHR: Protocol no. 14 Bis Urgently Reforms the Institutional Framework While Awaiting the Entry into Force of Protocol no. 14', 3 *Inter-American and European Human Rights Journal* (2010) 155, at 127–130; Council of Europe, Secretary General Welcomes Forthcoming Entry into Force of Protocol no. 14 (2010).

90 Protocol no. 14, *supra* note 37, para. 39.

91 PACE, 'Doc 10461: Candidates for the ECtHR' Strasbourg (2005), at 10407, 10449–10533.

92 Protocol no. 14, *supra* note 37, paras 48–49.

and presented lists of better qualified candidates or the states, in principle, could have pre-emptively picked candidates assumed to be more deferential when tenure changed from renewable to non-renewable terms. Stiansen and Voeten's study from 2020 suggests that this may be the case, arguing that the judges appointed after 2010 are on average more likely to defer to states than judges appointed before 2010.[93] Meanwhile, Kanstantsin Dzehtsiarou and Alex Schwartz have found that the Strasbourg bench has become more homogenous in terms of prior professional experience than it was in earlier years in the sense that it contains more former national judges and fewer lawyers and professors.[94]

Furthermore, 2010 also marks the beginning of the Interlaken reform process, which has included political declarations urging the Court to increase usage of the margin of appreciation and to be more deferent to the states.[95] According to some academic commentary, this reform process has been accompanied by a change towards greater state deference,[96] but there is not general agreement that this is the case.[97] For our study, these alternative hypotheses mean that there is a risk that what we register as changes in judge behaviour – especially if it is towards more deference to the state – may not be due to changes in tenure but, rather, to changes in the judges selected in the first place. In order to control for this, we will look in particular at the 22 transition judges in our sample – that is, judges that were elected for renewable terms before 2010 but who had their terms made non-renewable following the entrance into force of Protocol no. 14. Furthermore, as already indicated, our study goes beyond simple vote counting and also analyses the arguments applied in separate opinions.

4 Methodology

As already alluded to in the previous sections, this article utilizes a mixed-methods approach combining data-driven methods with doctrinal analysis. The reasoning for incorporating both methods is to utilize the benefits of each whilst avoiding the pitfalls. The use of quantitative methods in the analysis of case law has the benefit

[93] Stiansen and Voeten, *supra* note 31, at 778.

[94] Dzehtsiarou and Schwartz, 'Electing Team Strasbourg: Professional Diversity on the ECtHR and Why It Matters', 21 *German Law Journal* (2020) 621, at 641–643.

[95] Committee of Ministers, Interlaken Declaration (2010), at PP-6, 2, E-9(b), E-8; Committee of Ministers, Izmir Declaration (2011) at 4, 5 (the Conference), 6, 7, H-2; Committee of Ministers, Brighton Declaration (2012), at B-11, B-12(a-b), C-15(d), E (margin of appreciation); Committee of Ministers, Brussels Declaration (2015) at 1, 4, 7; Committee of Ministers, Copenhagen Declaration (2018) at 7, 28(b-d), 31, 55–60.

[96] Popelier and Van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer International Legal Theory', 30 *Leiden Journal of International Law* (*LJIL*) (2017) 5, at 24; Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg against the UK?' in E. Wicks *et al.* (eds), *The UK and European Human Rights: A Strained Relationship?* (2015) 194; Helfer and Voeten, *supra* note 52.

[97] Molbæk-Steensig, 'Subsidiarity Does Not Win Cases: A Mixed Methods Study of the Relationship between Margin of Appreciation Language and Deference at the European Court of Human Rights' (2023) 36 *LJIL* 83, at 91–95.

of avoiding accidental or deliberate cherry-picking of a specific category of cases. Quantitative methods are particularly useful for providing overviews and determining whether there are particular trends in case law development. The drawback or risk when engaging in quantitative studies on case law is that subtle but decisive changes to legal interpretations may be missed. Quantitative studies that are concerned only with the final outcome of a case are particularly problematic in this regard. In traditional doctrinal research, subtle clues in judicial interpretation and argumentation are front and centre, and authors are required and expected to take the reader through the interpretation of a given decision step by step in order to be convincing.[98] What traditional doctrinal studies lack, however, are methodological assurances that they are representative of the reality studied. In this study, we therefore combine the two methods. All quantitative steps as well as the qualitative coding have been made available in the supplementary materials, and, in section [5], a wide selection of examples of the doctrinal analysis that was conducted to make the qualitative coding are made available in order to take readers through the interpretive logic applied in this study. In the following pages, we will present this method, the data preparation undertaken and the hypotheses applied in greater detail.

A *Hypotheses*

Based on the existing literature presented in the earlier sections, we expect to find that the switch from renewable to non-renewable terms allows judges to act more independently from their appointing states. We assume that there exist situations in which an impartial and independent national judge would write separate opinions defending or criticizing their appointing state in the interest of getting the judgment right, guiding the home state or clarifying the law, and we hypothesize that renewable terms may in some cases put undue pressure on judges to limit this form of criticism. There are many factors both legal and extra-legal that may impact whether a judge chooses to write a separate opinion and in which direction, making it difficult to say for certain whether an individual separate opinion demonstrates greater or lesser independence on the part of the judge. In the aggregate, however, we expect such background noise to remain fairly constant, enabling us to test the hypothesis that, with the introduction of non-renewable terms in 2010, there has been one less barrier to judges criticizing their appointing states, leading to an increase in such opinions.

We do not expect the 2010 change to have impacted the judges' independence from the rest of the bench, as there has been no change to the relationship between national judges and other judges, only to their relationship with their appointing states. An important caveat to this hypothesis is that a nine-year term as judge of the ECtHR is not equivalent to a whole career. Depending on their age, judges may therefore need to find other employment afterwards. A system was suggested in the Steering Committee

[98] In Stone Sweet, Sandholtz and Andenas' critique of Voeten and Helfer's article on walking back judgments at the ECtHR, their main point of contention was that the doctrinal analysis behind the coding of Voeten and Helfer's dataset was hidden and potentially over-simplified. Stone Sweet *et al.*, Walking Back Dissents: A Reply to Helfer and Voeten', *supra* note 53, at 902–904.

for Human Rights' (CDDH) report on the longer-term future of the Court, whereby a judge of the ECtHR whose term had expired would be automatically nominated for the next upcoming position at the highest national court. In some states, however, this suggestion was deemed constitutionally impossible,[99] and, in any case, it has not been implemented in the Council as a whole. For our study, this means that the effect that we may see of changing from renewable to non-renewable terms may not be as big as it could be if the non-renewable term was longer.

B *Data Preparation*

This study utilizes the ECtHR Open Data project (ECHR-OD) for data preparation.[100] The ECHR-OD provides a high-quality and almost exhaustive database of ECtHR judgments, structured for legal research enquiries. The project extracts, cleans and normalizes all publicly available information from the HUDOC database, including descriptive and textual features. This is done dynamically, which means that, unlike traditionally scraped datasets, the ECHR-OD is always up to date. In terms of limitations, the repository contains cases for which the judgment is available in English and in a Microsoft Word format; this excludes some three-judge committee cases, which are available only in French, and a handful of early cases, which are only available in a PDF format. Since this study looks only at cases with separate opinions after 1998, our dataset is exhaustive.[101]

At the moment,[102] the ECHR-OD online explorer offers 14,714 cases because it presents only the cases that have full meta-data information. However, since the whole source code to recreate the repository from scratch is available, we used it and removed the quality filters as we needed only the year, the decision body members and the full judgment text. As a result, we were able to gather 39,987 cases. We then filtered these to keep only those between January 1998 and May 2021, with a clear conclusion on at least one article – that is, a violation or no violation – leaving us with 22,198 judgments. The ECHR-OD project does not (yet) extract the opinions from the judgment documents. Therefore, we had to parse the judgment documents after the conclusion to identify the opinions and the authors.

[99] CDDH, The Longer-term Future of the System of the European Convention on Human Rights, Doc. CDDH(2015)R84 Addendum I (2015), para. 108.

[100] Quemy and Wrembel, 'On Integrating and Classifying Legal Text Documents', 12391 *Database and Expert Systems Applications* (2020) 385. The database is available at https://echr-opendata.eu under the Open Database Licence. The creation scripts and website sources are provided under MIT licence, and they are available at https://github.com/echr-od/ECHR-OD_predictions.

[101] To ensure full replicability, the ECtHR Open Data project (ECtHR-OD) is guided by three core values: reusability, quality and availability. To achieve these, the project ensures (i) thateach version of the datasets is carefully versioned and publicly available, including the intermediate files; (ii) that the integrity of the process and files produced are carefully documented; (iii) that the scripts to retrieve the raw documents and to build the datasets from scratch are open-source and carefully versioned; (iv) that no data is manipulated by hand at any stage of the creation process to make it fully automatic; and (v) that the ECHR-OD is augmented with rich metadata that allow researchers to understand and use its contents more easily.

[102] On 19 March 2022.

The documents containing at least one opinion are flagged by the ECHR-OD, making them easy to identify. The judges were identified through the names in the document, complicated by the fact that the naming of judges in ECtHR judgments is inconsistent. The same judge might be referred to as Krzysztof Wojtyczek, K. Wojtyczek or Mr. Wojtyczek. To improve matching between the opinion authors and the judges present in the decision body, we used the official list of judges since the creation of the Court[103] and wrote new code to detect a judge's name.[104] This code mixes natural language processing techniques with ad hoc pattern matching to make certain that each name in the list of decision body members has a counterpart in the normalized list of judges provided by the Court. With this, we could unify the judges' names across judgment documents and opinions. Since the ECHR-OD project is open source, the work done for this study has been fully integrated into the project, enhancing the overall quality of the data.[105]

Having identified the opinions and their authors, we matched these with the country of origin of each judge and each case and created our sample of opinions written by national-level judges. This gave us a sample of 215 separate opinions written by 60 different national judges; seven of the opinions turned out to be false positives in the form of references to other separate opinions, leaving us with 208 opinions in 198 different cases. In a few cases, the national judge was the author or co-author of more than one separate opinion. Cases in which separate opinions are provided by a national judge are quite rare. Out of the total set of 22,198 judgments between 1998 and 2021, 87 per cent were unanimous, and 3,868 (17 per cent) contained at least one separate opinion. There were no cases in which a judge voted against the majority without providing a separate dissenting opinion explaining why, but there were more than 900 cases in which at least one separate concurring opinion was issued, even though the judgment was unanimous. Our 208 opinions in 198 cases containing a separate opinion by a national judge thus represent less than 1 per cent of all judgments in the period and around 5 per cent of all judgments containing a separate opinion. In our dataset, 70 opinions were mainly concurring, while 138 were mainly dissenting.

C *Determining Group Categories*

The next important question was how to create pre-/post-2010 groups. There were two different options that each have their merit and that we have therefore included here as two different models. In Model 1, we grouped the opinions by whether the national judge in question assumed office before or after 2010. This approach has the benefit that the post-2010 judges have been immediately selected for a non-renewable term and have therefore always known that their behaviour on the Court could not

[103] European Court of Human Rights Website, www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf (last visited 10 July 2023).

[104] Github, at https://github.com/echr-od/ECHR-OD_process/blob/develop/echr/steps/format_judges.py (last visited 10 July 2023).

[105] Github, at https://github.com/echr-od/ECHR-OD_process/pull/179 (last visited 10 July 2023).

impact the renewability of their term. Additionally, this grouping best describes the generalizable difference between renewable and non-renewable terms because the initial appointment could be influenced by whether the judge in question is destined for a renewable or non-renewable term. For the ECtHR in particular, this grouping also makes the post-2010 group identical to how judges will be elected in the future.

Model 1 has the drawback that, in the transition period after 2010, the judges who were already on the bench had their renewable six-year terms converted to non-renewable nine-year terms by having an additional three years added. This means that, in the cases where a judgment and separate opinion were issued after 2010 by a judge elected before 2010, it is still treated by a national judge who does not have the opportunity to be re-elected and thus cannot be pressured to work towards re-election either. In Model 2, we therefore created pre-/post-2010 groups by dividing the opinions as to whether the judgment in question was issued before or after 2010. Model 2, of course, has the drawback that it does not represent how judges will be elected in the future nor can it indicate how legal systems in general are likely to behave with judges serving non-renewable terms. We will consider our results robust if our hypothesis can explain the results in both models. Additionally, the two models also allow us to single out transition judges as a particularly interesting group to observe for whether they have changed behaviour once their terms became non-renewable. Due to the complexity of many of the ECtHR cases, which often treat several potential violations of several different aspects of several different articles, the determination of whether a separate opinion is concurring or dissenting is not overly useful for our analysis of whether opinions are more or less critical of the respondent state, but since having an opinion named 'dissenting' or 'partially dissenting' usually indicates that the author of the opinion has voted differently from the majority on at least one aspect of the case, we were interested to see if any changes in separate opinions were mostly driven by concurring or dissenting opinions (see Figure 1).

When looking at Model 2, the main change after 2010 is an increase in the proportion of concurring opinions. Concurring opinions are particularly difficult to deal with

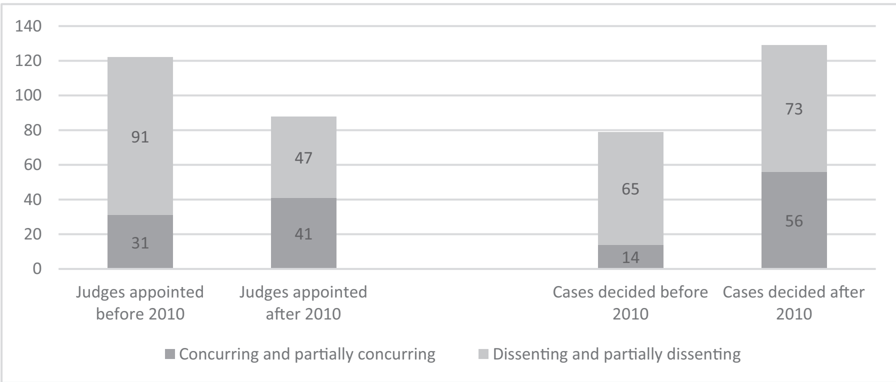

Figure 1: *Distribution of opinion types pre-/post-2010 in Models 1 and 2*

without going into the legal argumentation because they may be delivered for many different reasons. For this study on national judges, for example, it may be that a concurring opinion where the judge has voted for a violation judgment could be used to double down on the violation decision, expressing disappointment with the appointing state, or it could be used to explain to audiences at home why the national judge voted for a violation decision in order to safeguard the relationship with the appointing authority. Additionally, many judgments contain decisions on several articles, some of which may have a violation result, whilst others have a non-violation result. As a result, a partially dissenting opinion could be concurring with either all violation decisions in the judgment and dissenting with non-violation decisions or vice versa.

Given this ambiguity, the determination of whether an opinion is concurring or dissenting is not enough to draw conclusions about what the opinion argues. This study deals with this ambiguity in two ways, in part by not abandoning the doctrinal methodology and in part by including a manual coding of all 208 separate opinions as to whether they are for or against the respondent state. This coding has six categories ranging from mostly technical disagreements, with the majority on the bench in line with the idea of delivering opinions to ‘get the judgment just right’[106] over arguments that, ‘on the balance’, the decision should have turned out in favour of / against the respondent state, to ideologically charged opinions doubling down on criticizing or defending the respondent state (see Table 1). Such a coding necessarily contains a degree of interpretation, as does all

Table 1: Codebook

Code	Description
For ++	Strong defence of the state and/or rejection of the idea that the Court has jurisdiction in the case at hand. In addition, strong arguments that the majority should respect the principle of subsidiarity.
For	Argument that, on balance, taking into account procedural or proportionality arguments, or to safeguard case law coherence, the case should be resolved with a non-violation judgment or inadmissibility decision.
For/Neither	Technical argumentation that does not differ strongly from the majority opinion but argues in favour of another type of interpretation / another body of precedent and which, on balance, results in a non-violation or inadmissibility judgment.
Against/Neither	Technical argumentation that does not differ strongly from the majority opinion but argues in favour of another type of interpretation / another body of precedent and which, on balance, results in a violation judgment.
Against	Argument that, on balance, taking into account procedural or proportionality arguments or to safeguard case law coherence, the case should be resolved with a violation judgment.
Against++	Strong condemnation of the state or an argument that the very essence of a right has been violated and/or statements that the problem identified is systematic rather than confined to the case in question.

[106] Hall, *supra* note 46, at 131–133.

doctrinal work, but the binary determination of whether the opinion in general is arguing for more or less condemnation of the respondent state than the majority opinion is quite straightforward and, for the most part, unlikely to be contested. All codings are available in the supplementary materials online so that readers may conduct their own analyses.

5 Analysis and Results

Our analysis shows a decisive change in the number and kinds of opinions delivered by national judges before and after 2010. In Model 1, the judges elected post 2010 were half as likely to write opinions defending their home states – in 39 cases, a judge elected after 2010 for a non-renewable term wrote an opinion defending the home state, while this happened in a full 77 cases before 2010 when the judges' terms were renewable. In Model 2, the tendency is the same, but the biggest difference is in the number of critical opinions that increased almost three-fold. In cases delivered before 2010 when terms were renewable, national judges wrote only 19 opinions that were critical of their appointing state, while, in cases after 2010 when the terms had been made non-renewable, 73 such opinions were published. Both models thus depict the same tendency but with different modalities (Figure 2).

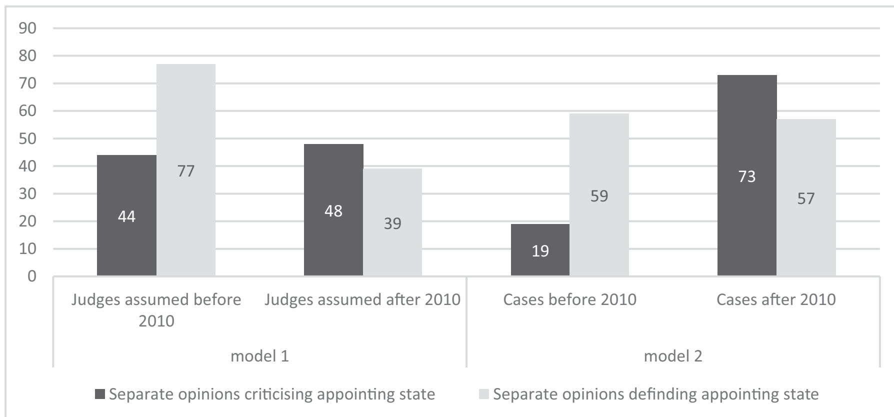

Figure 2: *Separate opinions before and after 2010*

The differences between the two models come down to the transition judges who were elected before 2010 but who had their renewable terms transformed into non-renewable terms when the 2010 reform took place. This means that, in Model 1, all of their opinions are counted in the before-2010 column, while, in Model 2, opinions given before 2010 are in one column while opinions given after are in the post-2010 column. Of the 60 judges studied, 22 were such transition judges. The transition judges delivered 34 opinions before 2010 and 40 opinions after. In Model 1, there was also a general trend for both transition and non-transition judges to deliver more separate opinions concerning their appointing state after 2010. Looking at the same data but divided year by year, this becomes particularly obvious (see Figure 3).

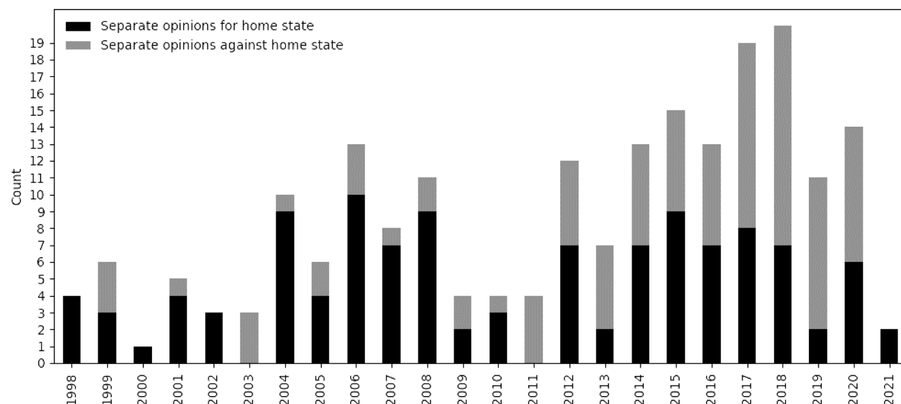

Figure 3: *Evolution of the number of separate opinions over the years*

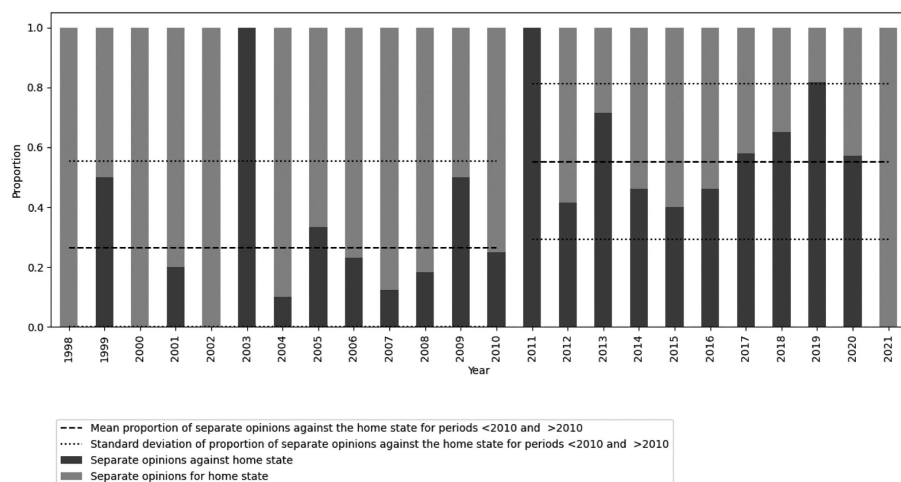

Figure 4: *Evolution of the proportion of separate opinions over the years*

In Figure 4, we display the ratio of separate opinions for and against the home state year per year, making the trend more easily visible. Using the ratio rather than the absolute count, as in Figure 3, removes the effect related to the variability of the total number of separate opinions. There is still a large variability year to year (approximately 27 per cent standard deviation), but this does not take away from our conclusion. Indeed, our main hypothesis was that the period after 2010 would be qualitatively different from the period before 2010, in the direction of comparatively more opinions criticizing the state and fewer defending it, and this is what we see. Since the standard deviation of year-to-year ratios is similar for the two periods (29 per cent before 2010, 26 per cent after 2010), we can assume that the external factors of variation are fairly stationary, and we have no reason to suspect a different random noise between the periods. To answer our hypothesis, we need to

understand (i) whether the proportion of separate opinions against the home state is significantly different between groups and (ii) if a constant model is the best model given the data.

To answer the first question, we display the mean proportion of opinions criticizing the state for both groups as well as their respective standard deviations. The difference between the average ratio (26:74 to 56:44) is 29 per cent – that is to say, higher than the standard deviation of both groups. A z-test on the proportion is significant at 1 per cent and below (assuming the normality hypothesis behind is correct in our case). To answer the second question, we performed a linear regression for each group. The main coefficient is close to zero (0.5 per cent before 2010, –0.4 per cent after), which leads to a regression extremely close to the average for both groups and hints that the best model per segment is a constant model. We also performed a linear regression on the entire time series, and the main coefficient is five times larger (2.3 per cent per year). If a variation of proportion is constant for each segment but globally increasing (or decreasing), it mathematically means that the segmentation hides the phenomena that induce the trend that, in our case, is the reform of 2010. Here, it is important to note that we do not think that a linear regression is the correct model, and, therefore, we are not really interested in studying quantitatively the coefficient. We do not believe that the statement 'the proportion of critical opinions rise 2.3 per cent per year' is true or very useful. The main technical argument is instead that the variance explained by a global linear model (approximately 29 per cent) is significantly lower than the variance explained by the model constant by segment (approximately 70 per cent).

In terms of limitations, we have treated the separate opinions as binary for this study, while we know that each opinion expresses several nuances that therefore limit a strictly quantitative analysis. Reducing the behaviour of judges to such simple rule(s) is at best absurd, which is why the opinions are analysed in greater detail in the following section. Instead, we here apply regression as a tool to show that there is a global phenomenon that does not exist for both groups, meaning that something happened precisely in 2010.

In the following two subsections, we go beyond the binary and quantitative results presented here to discover what type of arguments national judges use to criticize or defend the appointing state. This is done using a mix of qualitative coding and traditional doctrinal analysis since such separate opinions often contain a variety of arguments and, therefore, a single coding shows only part of the picture. We will first tackle the opinions that are critical of the appointing state and then those that defend the appointing state.

A *Criticizing the Appointing State*

Not all types of criticism are equal. In our qualitative coding of the separate opinions, we therefore distinguish between stronger and weaker critique. In cases after 2010 (Model 2), around 10 per cent of opinions by national judges contain strong criticism, while, before 2010, there was only a single such opinion in which the national

judge strongly suggested finding against their appointing state – namely, the dissenting opinion by the Italian judge Vladimiro Zagrebelsky in the Grand Chamber case *Markovic and others v. Italy.* This case was launched by 10 relatives of individuals who had lost their lives in the NATO airstrikes of Belgrade in 1999. The applicants had attempted to sue the Italian prime minister and others for damages, but the Italian Court of Cassation rejected their case, stating that it did not have the jurisdiction to examine decisions made by the executive, an argument that the ECtHR majority accepted. In Judge Zagrebelsky's dissenting opinion, where he was joined by six other judges, he argued that the Italian Court of Cassation's statement that it could not hear the case because it concerned a political act and 'protected individual interests are no bar to carrying out functions of a political nature' was deeply troubling and that the ECtHR's majority decision to accept that argument 'strikes a blow at the very foundation of the Convention'.[107] Even with this forceful language condemning the state, the national judge still made sure to point out that '[i]t was by pure chance that the question arose in a case against Italy. It could just as easily have been another state' (see Figure 5).

There are several cases, however, where a transition judge appointed before 2010, but delivering the opinion after 2010, makes an unequivocal argument that a violation against the state should have been found. These include the Bulgarian judge Zdravka Kalaydijeva co-authoring a concurring opinion in *Biser Kostov v. Bulgaria* and a single-authored dissenting opinion in *Hristozov and Others v. Bulgaria.*[108] *Biser Kostov* was a case based on the failure of authorities to

Figure 5: *Separate opinions before and after 2010*

[107] ECtHR (Grand Chamber), *Markovic and Others v. Italy*, Appl. 1398/03, Judgment of 14 December 2006, Dissenting Opinion of Judge Vladimiro Zagrebelsky joined by Judges Boštjan Zupančič, Karel Jungwiert, Margarita Tsatsa-Nikolovska, Mindia Ugrekhelidze, Anatoly Kovler and Davíd Thór Björgvinsson.

[108] ECtHR, *Biser Kostov v. Bulgaria*, Appl. no. 32662/06, Judgment of 10 January 2012, Joint separate Opinion of Judges Zdravka Kalaydjieva and Vincent De Gaetano; ECtHR, *Hristozov and Others v. Bulgaria,*, nos. 47039/11 and 358/12, Judgment of 13 November 2012.

investigate the ill-treatment of the applicant by supermarket employees after he had been accused of stealing. The ECtHR unanimously found a violation of the procedural arm of Article 3, while the concurring opinion called for even stronger language condemning what it termed de facto tolerance by authorities of violence.[109] The other case, *Hristozov*, dealt with the lack of access to experimental treatment for terminal cancer patients. The state did not allow the applicant to seek the treatment abroad although it came with no additional cost to the state. The majority opinion argued that health care decisions of this kind fell within the margin of appreciation of the state and found no violation; meanwhile, Judge Kalaydijeva argued that there was no indication that the state had undertaken any balancing between competing aims and interests, and, as a result, the state was not due any margin.[110]

Another case worth mentioning is the Turkish judge Ayşe Işıl Karakaş' joint dissenting opinion in *Ertuş v. Turkey*.[111] This was a complex case about the alleged ill-treatment of a 15-year-old boy in police custody. Where the majority focused on the uncertainty regarding the facts of what happened in custody, the dissenting opinion relied instead only on the arrest of the applicant, which had been filmed and was not contested, arguing that the rough treatment of the young applicant during the arrest alone was enough to warrant a violation of Article 3.[112] Although both Judge Karakaş and Judge Kalaydijeva were appointed in 2008, neither of them gave separate opinions in cases concerning their appointing states until after 2010. This does not necessarily mean that they personally tried to keep the peace with the appointing state until then, but it may be that there simply were no cases on their home state where they disagreed with the majority until then; Judge Karakaş, who was a particularly active writer of separate opinions, still wrote just 10 separate opinions regarding her own state in 11 years, making it perfectly plausible that no cases happened to come up in the first two years of her tenure. The aggregate change in the opinions written by the transition judges is an indicator, however, that the transformation from renewable to non-renewable terms may have removed some pressure on their judicial independence. The 22 transition judges delivered 34 opinions before 2010 and 40 opinions after. Among these opinions, seven were against the state before 2010 compared with 23 after 2010, while 27 were defending the state before 2010 compared with 17 after.

After the 2010 change, in both models, the number of opinions that were critical and very critical of the appointing state increased significantly. Some concurring opinions aimed to double down on the majority judgment. One such example is Judge Marko Bošnjak's *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, where he argued that the failure to secure a fair trial for the applicant company was a structural

[109] *Biser Kostov*, *supra* note 108.
[110] *Hristozov*, *supra* note 108.
[111] ECtHR, *Ertuş v. Turkey*, Appl. no. 37871/08, Judgment of 5 November 2013, Joint Partly Dissenting Opinion of Judges Dragoljub Popović, Işıl Karakaş and Paulo Pinto De Albuquerque.
[112] *Ertuş*, *supra* note 111.

problem in Slovenia that he urged authorities to address and furthermore suggested that the applicant company apply for additional damages through the Slovenian constitutional system.[113] Another example is the Russian judge Dmitry Dedov's concurring opinion in *Primov and Others v. Russia.* In this case, the Court unanimously found violations of two counts of Article 11 on the right to assembly. The national judge concurred but took the argumentation a step further, stating that the authorities' outlawing of the protests because they did not agree with the views presented struck at the very core of citizens' right not only to assembly but also to democratic participation.[114]

Another interesting opinion that suggests judicial independence from the appointing state is Judge Aleš Pejchal's concurring opinion in *Regner v. Czech Republic* from 2015. With regard to the specific applicant, he agreed with the majority that there had not been a violation of the right to a fair hearing, although the applicant – a vice-minister for defence – had not had access to the documents used for conducting the cross-check of his security clearance. In his concurring opinion, however, Judge Pejchal argued that the practice in Czechia on security cross-checks was deeply problematic and, as a result, the judgment should not be generalized. He went on to state that 'I deem this judgment to be applicable only to persons who hold the same office as the applicant or a very similar one',[115] effectively inviting future litigation from other citizens subjected to security checks. This type of separate opinion is particularly relevant to our question about independence because Judge Pejchal did not have to deliver it. He had voted with the majority and could have easily remained quiet if he had preferred not to attract negative attention from the appointing authority. He chose instead to point to what he deemed to be a general human rights problem in his home state. Judge Griţco's concurring opinion in *Savca v. Republic of Moldova* from 2016 also relied on the intimate knowledge that the judge had of his country to point to systematic problems – in this case, with the precision of domestic legislation.[116] Judge Paulo Pinto de Albuquerque's dissenting opinion in *Fernandes de Oliveira v. Portugal* from 2019 strikes a similar note. This case concerned the failure of state authorities to prevent the escape and suicide of a patient suffering from depression and schizophrenia and subsequent failure to investigate the death. The majority found a violation of the procedural arm of Article 2 on the right to life but not of the substantive arm. The national judge argued that a substantive violation should also have been found and that '[t]he procedural violation of Article 2 goes well

[113] ECtHR, *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, Appl. no. 47072/15, Judgment of 23 October 2018, paras 3, 8–9, Concurring Opinion of Judge Marko Bošnjak.

[114] ECtHR, *Primov and Others v. Russia*, Appl. no. 17391/06, Judgment of 12 June 2014, paras 3–4, Concurring Opinion by Judge Dedov.

[115] ECtHR, *Regner v. Czech Republic*, Appl. no. 35289/11, Judgment of 26 November 2015, Concurring Opinion of Judge Pejchal.

[116] ECtHR, *Savca v. Republic of Moldova*, Appl. no. 17963/08, Judgment of 15 March 2016, Concurring Opinion by Judge Griţco.

beyond the majority's very limited criticism'.[117] Judge Pinto de Albuquerque similarly drew on his specific knowledge about the respondent state, stating that, '[t]o put it simply, the majority's opinion was written for a country other than Portugal at the time of the events'.[118] Another interesting example is Judge Paul Lemmens' concurring opinion in *S.J. v. Belgium* from 2014, a case about an HIV-positive, eight-month-pregnant Nigerian national who had been expelled from Belgium after her asylum application had been rejected.[119] The majority found a procedural violation but no violation of Article 3 and, therefore, no requirement for the Belgian state to allow the applicant to stay.[120] To reach this solution, they relied on the principles developed in the famous *N. v. United Kingdom* case, which only in the most exceptional cases prevents the expulsion of seriously ill foreign nationals on the grounds that they will not have access to sufficient health care outside the respondent state.[121] In *S.J.*, the national judge, Judge Lemmens, argued that he had voted with the majority, finding no violation of Article 3 in this case as they were bound by precedent, but he also maintained that the threshold determined by *N. v. United Kingdom* was very high. He went on to urge the Belgian state to secure a higher level of protection regardless of the non-violation judgment.[122] The case was hereafter referred to the Grand Chamber but was struck out following a friendly settlement in which the Belgian state granted the applicant and her children indefinite leave to remain in Belgium,[123] suggesting that the respondent state may have followed the advice of its national judge.

As described above, the number of cases in which the national judge wrote an opinion against their appointing state increased significantly after 2010, but the practice of critiquing and guiding the home state existed well before 2010, and judges were engaged in the practice even though they might put themselves at risk of not being reappointed. *Kleyn and Others v. the Netherlands* represents such a case. The applicants were a group of citizens opposed to the construction of a railway line, and their main human rights complaint was that the judicial body that treated their requests to stop the construction was also advising the government and could therefore not be said to be an impartial body. The Grand Chamber found in favour of the government, stating that it saw no evidence that the tribunal had not been independent. However, the national judge, Judge Thomassen, argued in a joint opinion that, even if the body was independent, the double role did not inspire the necessary confidence that courts must

[117] ECtHR (Grand Chamber), *Fernandes de Oliveira v. Portugal*, Appl. no. 78103/14, Judgment of 13 January 2019, para. 55, Partly Concurring, Partly Dissenting Opinion of Judge Pinto De Albuquerque Joined by Judge Harutyunyan.

[118] *Ibid.*, para. 1.

[119] ECtHR, *S.J. v. Belgium*, Appl. no. 70055/10, Judgment of 27 February 2014, Concurring Opinion by Judge Lemmens joined by Judge Nussberger.

[120] *Ibid.*

[121] *Ibid.*, para. 124; ECtHR (Grand Chamber), *N. v. United Kingdom*, Appl. No. 26565/05, Judgment of 27 May 2008.

[122] *S.J.*, *supra* note 119.

[123] *Ibid.*, paras 56–58.

have in the public.[124] She wrote a similar opinion in *Said v. The Netherlands*, a case on procedural justice in asylum cases, where the majority found the state's practice of rejecting asylum requests solely due to the lack of physical documentation of the applicant's story to be a violation and Judge Thomassen then doubled down in her concurring opinion, stating that the state had not even attempted to corroborate the evidence that the applicant had provided.[125]

Other examples include decisions by the Maltese judge Giovanni Bonello, who wrote several opinions aiming to reform the Court's practice on just satisfaction,[126] including in opinions concerning cases against his appointing state,[127] and the German judge Georg Ress' opinions urging improvements of procedural protections in his appointing state.[128] Neither Judge Ress nor Judge Thomassen had their terms renewed after their first six-year tenure, but we have no evidence indicating that the non-renewal in these cases was not amicable; Judge Thomassen went on to become a judge at the Dutch Supreme Court, while Judge Ress returned to work as a professor of international law. Judge Bonello too was not originally renewed but presumed to retire having reached the age of 68 in 2004 when his term expired. The Maltese state, however, delivered a list of three names that were all male. This contradicted the requirements of Assembly Resolution 1366(2004), which required at least one candidate of each gender, and, therefore, the Parliamentary Assembly did not vote for any of the candidates. When Malta did not deliver any new lists of names, the Assembly eventually renewed the term of Judge Bonello instead.[129] As a result, this selection of critical pre-2010 opinions was actually delivered by judges that either were not, or were not expecting to be, renewed.

B *Defending the Appointing State*

In addition to the increase in national judge opinions criticizing the appointing state, the 2010 change also saw a decrease in national judge opinions in favour of the state. These types of opinions come in many different shapes. One is subsidiarity-based, stating that the subject matter of a case falls within the margin of appreciation of the state and, as such, that the decisions of national courts or other authorities ought to be respected and the ECtHR should not substitute its own opinion. Such opinions do not necessarily contain an argument that the state has acted well but, rather, that it is not the Court's job to determine whether it has. This type of opinion in favour

[124] ECtHR (Grand Chamber), *Kleyn and Others v. The Netherlands*, Appl. nos. 39343/98 and 3 others, Judgment of 6 May 2003, Dissenting Opinion of Judge Thomassen joined by Judge Zagrebelsky.

[125] ECtHR, *Said v The Netherlands*, Appl. no 2345/02, Judgment of5 July 2005, Concurring Opinion by Judge Thomassen.

[126] Judge Zupančič, *supra* note 47, at 219–220.

[127] ECtHR (Grand Chamber), *Aquilina v. Malta*, Appl. no. 25642/94, Judgment of 29 April 1999; ECtHR (Grand Chamber), *T.W. v. Malta*, Appl. no. 25644/94, Judgment of 29 April 1999.

[128] ECtHR (Grand Chamber), *Sommerfeld v. Germany*, Appl. no. 31871/96, Judgment of 8 July 2003; ECtHR, *Van Kück v. Germany*, Appl. no. 35968/97, Judgment of 12 June 2003.

[129] Committee on Legal Affairs and Human Rights and Sub-committee on the Election of Judges to the ECtHR, *supra* note 79; McNamara, *supra* note 68, at 6.

of the state has been issued by national judges both before[130] and after 2010,[131] but, before 2010, such arguments were much more common; in this study, they were present in roughly one-third of all cases before 2010, while only in roughly a tenth of cases afterwards. A related category consists of cases where the national judge makes a claim that, in fact, the procedure adopted by the national courts is laudable and/or that the applicants are themselves to blame. Such opinions are most common in relation to Article 6, and we have examples both before[132] and after[133] 2010, with little change in frequency.

The kind of separate opinion that launches the greatest defence of the appointing state is usually one related to the determination of the facts of the case. Such opinions have emerged, in particular, in cases dealing with transitional justice-related questions where the national judge on occasion comes out very strongly on the side of the appointing state, defending the dominant national narrative. Examples include Judge Khanlar Hajiyev's opinion in *Sargsyan v. Azerbaijan*,[134] Judge Alvina Gyulumyan's opinion in *Chiragov and Others v. Armenia*[135] and Judge Dedov's opinions in *Georgia v. Russia (I) and (II)*.[136] These types of opinions were present in our dataset both before and after 2010 with little change in frequency, suggesting that in cases of this kind, which are particularly sensitive in national political landscapes, the change from renewable to non-renewable terms has little effect.

A final specific type of opinion to mention is the one that is most certain to confound the types of studies that focus only on the votes of the judges and not on their argumentation – namely, cases that explain to the appointing state why the appointed judge has voted for a violation, attempting to soften the blow of the violation judgment or guide the state to avoid litigation in the future without having to give up core

[130] Examples include: Judge Bototucharova's dissent in ECtHR, *Tsonev v. Bulgaria*, Appl. no. 45963/99, Judgment of 13 April 2009 (a case on the registering of a political party with a name very similar to other political parties already in existence); Judge Jebens dissent in ECtHR, *Orr v. Norway*, Appl. no. 31283/04, Judgment of 15 May 2008 (a case on the presumption of innocence in a tort-case on the same topic as a criminal case).

[131] Examples include Judge Laffranque's dissent in ECtHR, *Sõro v. Estonia*, Appl. no. 22588/08, Judgment of 3 September 2015 (a case on the publication of names of former members of the secret police); Judge Raimondi's dissent in ECtHR, *Stefanetti and Others v. Italy*, Appl. nos. 21838/10 and 7 others, Judgment of15 April 2014 (a case concerning the right to property for a group of pensioners who had paid parts of their contributions from abroad where contributions were lower).

[132] Such as Judge Conforti's dissent in ECtHR, *Di Donato and Others v. Italy*, Appl. no. 41513/98, Judgment of 26 April 2001, or Judge Garlicki's opinion in ECtHR, *Dzieciak v. Poland*, Appl. no. 77766/01, Judgment of 9 December 2008 (where he argued that although there was a substantive violation of Article 2 when a prisoner in ill health died in custody after not being taken to a hospital, the investigation undertaken by the state afterwards appeared to be in order).

[133] Such as Judge Dedov's dissent in ECtHR, *Mazepa and Others v. Russia*, Appl. no. 15086/07, Judgment of 17 July 2018 (a highly political case on the investigations into the murder of an investigative journalist that produced and sentenced five contract killers but did not discover who had ordered the murder).

[134] ECtHR (Grand Chamber), *Sargsyan v. Azerbaijan*, Appl. no. 40167/06, Judgment of 16 June 2017.

[135] ECtHR (Grand Chamber), *Chiragov and Others v. Armenia*, Appl. no. 13216/05, Judgment of 12 December 2015.

[136] ECtHR (Grand Chamber), *Georgia v. Russia (II)*, Appl. no. 38263/08, Judgment of 21 January 2021; ECtHR (Grand Chamber), *Georgia v. Russia (I)*, Appl. no. 13255/07, Judgment of 3 July 2014.

beliefs. Of particular interest here is, for example, Judge Dedov's concurring opinion in *Alekseyev and Others v. Russia*.[137] The case concerned the authorities' repeated rejections of a lesbian, gay, bisexual and transgender group's applications to assemble and protest. Judge Dedov voted with the majority, finding that it was a violation of the applicants' rights under Articles 11, 13 and 14, but, in his concurring opinion, he explained that the reason that the applicants' requests could not be rejected by the authorities were that they concerned assemblies demonstrating for civil rights, such as the right to establish family relationships other than those consisting of one man and one woman, and were not assemblies aiming to promote their sexuality or 'way of life'. In a case such as this one, the national judge has voted against the state, but the opinion still searches for a compromise and, in some sense, contains a defence of the state.[138] Other examples of explanatory or softening opinions include Judge Saadet Yüksel's opinion in *Sabuncu and Others v. Turkey*,[139] Judge Ganna Yudkivska's opinion in *Lazoriva v. Ukraine*,[140] Judge András Sajò's opinion in *Ternovszky v. Hungary*[141] and Judge Egidijus Kūris' opinion in *Matiošaitis and Others v. Lithuania*.[142]

More common than the categories mentioned above are opinions concerned with the intricacies of interpretation. Around a third of all separate opinions after 2010 and a fifth before 2010 are thus less about criticizing or defending the appointing state and more about 'getting the judgment just right'[143] through reorganizing case law, suggesting a clarification of certain doctrines[144] or arguing that a different article would have been better suited to treat the case.[145]

6 Conclusions

In this article, we have hypothesized that the switch from renewable to non-renewable terms would increase the independence of national judges in relation to their appointing states, in principle allowing them to be more impartial. Specifically, our study has focused on the national judges' relationship with their appointing state. We therefore compared the national judges with renewable terms before 2010 to those with non-renewable terms after 2010 rather than with their colleagues from other states. We found that the number of separate opinions issued by judges in cases concerning

[137] ECtHR, *Alekseyev and Others v. Russia*, Appl. nos. 14988/09 and 50 others, Judgment of 27 November 2018, para. 2, Concurring Opinion by Judge Dedov.

[138] For this study, it was therefore coded as 'for/neither', even though the vote was for a violation decision.

[139] ECtHR, *Sabuncu and Others v. Turkey*, Appl. no. 23199/17, Judgment of 10 November 2020.

[140] ECtHR, *Lazoriva v. Ukraine*, Appl. no. 6878/14, Judgment of 17 April 2018.

[141] ECtHR, *Ternovszky v. Hungary*, Appl. no. 67545/09, Judgment of14 December 2010.

[142] ECtHR, *Matiošaitis and Others v. Lithuania*, Appl. nos. 22662/13 and 7 others, Judgment of 23 May 2017.

[143] The motivation that Matthew Hall has referred to as the most common in 'conscientious judges'. Hall, *supra* note 46, at 131–133.

[144] For example, Judge Mahoney in ECtHR, *Paulet v. United Kingdom*, Appl. no. 6219/08, Judgment of 13 May 2014, or Judge Birsan in EctHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, Appl. no. 33348/96, Judgment of 17 December 2004, or Judge Wildhaber in ECtHR, *Boultif v. Switzerland*, Appl. no. 54273/00, Judgment of 2 August 2001.

[145] Such as Judge Karakaş in ECtHR, *Joannou v. Turkey*, Appl. no. 53240/14, Judgment of 12 December 2017.

their appointing state rose significantly after terms were made non-renewable and that more of them criticized the appointing state, while fewer defended it. There was also a considerable change in the prevalence of certain types of arguments used in these separate opinions. Before 2010, the most common type of argument found in the separate opinions written by national judges was related to subsidiarity and the margin of appreciation, while, after 2010, most opinions were of a technical 'get the judgment just right' type, followed by opinions doubling down on violation judgments against the appointing state and offering guidance on addressing structural problems and improving human rights compliance. With the methodology we used, we did not need to equate the finding of violation judgments with judicial independence, nor did we equate agreement with the majority to judicial independence or engage with whether there is an appropriate additional level of deference that national judges may afford their home states due to their special knowledge. We looked only at whether the tendency to criticize the appointing authority had changed after 2010, and we found that it had.

There may well be situations in which the national judge has important insights into the national specificities of the state, and reacting to those does not necessarily indicate a dependence on the appointing state. In fact, in our dataset, we discovered several instances where the judge used their special knowledge to admonish states beyond what the majority did as well as cases in which the special knowledge was used to guide the state or defend the actions of the state. On the whole, the separate opinions we studied were rich, and there were remarkable examples of judges demonstrating their independence from their home states even under the presumed threat of non-renewal. That said, it is also a clear conclusion from this study that non-renewable terms in the aggregate remove an obstacle to writing such opinions. Judges should not have to consider reappointment when determining important human rights cases against their home states. Nor should they appear to be making such calculations.

Finally, our study revealed that national judges, from their unique positions where they are both deeply integrated into human rights law and uniquely knowledgeable about national particularities, can and do provide valuable guidance to their home states. Additionally, there are examples of states appearing to pay particular attention to the advice given by their national judges in Strasbourg. The risk of losing any such insights, however few, due to fear of non-renewal ought to be enough to prefer non-renewable terms. However, our investigation into the specificities of individual judges' backgrounds also revealed that the quest for independence goes well beyond term limits. Depending on the age and professional backgrounds of the judges, many of them will return to their home jurisdictions as judges or diplomats, lawyers or university professors. It is unfortunate that the high contracting parties have not made additional efforts to secure the position of their judges after the end of their terms, as suggested in the CDDH report on the longer-term future of the ECtHR.

In terms of limitations, this article has been written on the basis of a complete set of separate opinions delivered in English by national judges between 1998 and 2021. There is thus little risk of sampling biases, but there is a limitation in using separate opinions as a proxy for independence. First, independence may show itself in other

ways and, second, as described in section [2], the practice of delivering separate opinions is not common to all jurisdictions, and individual judges have different ideas about what purpose they serve and how prevalent they ought to be. We chose to study the opinions because they are the only place in which the individual voices of the judges are readily recognizable, which is also the reason for their richness of legal reasoning. To get a fuller overview of how tenure rules impact independence, future work might undertake biographical mappings of where former judges have ended up or aim, more qualitatively, at discovering how ECtHR judges understand their task of judging impartially. Since all doctrinal work contains a degree of interpretation, we have also made available in the online materials, for the benefit of other legal scholars who may wish to conduct their own doctrinal analysis, the full list of cases in which a national judge has delivered a separate opinion about their appointing state, along with an indication of how they have been coded.