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Candidates for the European Court of Human Rights

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Ms Marie-Louise BEMELMANS-VIDEC, Netherlands, Group of the European People's Party

Summary

Among the criteria for examining candidatures to the European Court of Human Rights, the Assembly has emphasised the need to have candidates of the required level to exercise the function of judge, in accordance with Article 21 of the European Convention on Human Rights, as well as the need for gender balance.

Under the current wording of [Resolution 1366 \(2004\)](#) on candidates for the European Court of Human Rights, as modified by [Resolution 1426 \(2005\)](#), the Assembly has no choice but to reject single-sex lists if that sex is overrepresented in the Court. Automatic rejection of such a list may, in exceptional circumstances, reduce the Assembly's ability to choose between three candidates who satisfy all the other selection criteria.

The Assembly should therefore amend paragraph 3.ii of [Resolution 1366 \(2004\)](#) as modified by [Resolution 1426 \(2005\)](#).



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A. Draft resolution

1. The Parliamentary Assembly has drawn up and adopted a procedure for examining candidatures to the European Court of Human Rights, for which it has laid down precise criteria.
2. The Assembly attaches great importance to gender balance in the Court and has developed criteria in order to ensure that lists contain candidates of the sex that is under-represented in the Court. As stated by the Court in its opinion dated 12 February 2008, “the criterion in question derives from a gender-equality policy which reflects the importance of equality between the sexes in contemporary society and the role played by the prohibition of discrimination and by positive discrimination measures in attaining that objective. The measures concerned in the present case certainly fall into the latter category. Moreover, there is far-reaching consensus as to the need to promote gender balance within the state and in the national and international public service, including the judiciary”.
3. The current wording of paragraph 3.ii of [Resolution 1366 \(2004\)](#) on candidates for the European Court of Human Rights as amended by [Resolution 1426 \(2005\)](#) rules out the consideration of lists of three candidates of the same sex if that sex is over-represented in the Court, regardless of the other criteria related to the qualifications of the candidates, and of the quality of the national selection procedure followed.
4. The Assembly therefore decides to amend [Resolution 1366 \(2004\)](#), as modified by [Resolution 1426 \(2005\)](#), by adding a new paragraph 4 to read as follows:

“The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21, paragraph 1 of the European Convention on Human Rights.

Such exceptional circumstances must be duly so considered by a two-thirds majority of the members casting a vote and a majority of the members entitled to vote of both the sub-committee and the Committee on Legal Affairs and Human Rights. This position shall be ratified by the Assembly in the framework of the progress report of the Bureau of the Assembly.”
5. Since the Sub-Committee on the Election of Judges to the European Court of Human Rights has become a standing sub-committee of the Committee on Legal Affairs and Human Rights, the Assembly also resolves to delete the words “ad hoc” in paragraph 1 of [Resolution 1366 \(2004\)](#), as modified by [Resolution 1426 \(2005\)](#).

B. Explanatory memorandum, by Mrs Marie-Louise Bemelmans-Vidéc

1. Introduction

1. In January 2004, the Parliamentary Assembly adopted [Resolution 1366 \(2004\)](#) and [Recommendation 1649 \(2004\)](#). In these texts, it confirmed the need to retain the selection procedure it established in 1996. It also emphasised the need to have candidates of the required level to exercise the function of judge in accordance with Article 21 of the European Convention on Human Rights (ECHR), as well as the need for gender balance.
2. In March 2005, [Resolution 1366 \(2004\)](#) was amended by [Resolution 1426 \(2005\)](#), under which single-sex lists of candidates may be considered by the Assembly if the sex is under-represented in the Court (under 40% of judges).
3. Under the current wording of the resolution, the Sub-Committee on the Election of Judges to the European Court of Human Rights has no choice but to recommend the rejection of single-sex lists if that sex is over-represented.
4. On 5 October 2006, I and several other members presented a motion for a resolution ([Doc. 11067](#)) to enable the existing rule to be waived in exceptional circumstances. At its meeting on 6 October 2006, the Committee on Legal Affairs and Human Rights endorsed this motion, in which we proposed adding a clause to paragraph 3.ii of [Resolution 1366 \(2004\)](#) as amended by [Resolution 1426 \(2005\)](#). The committee also appointed me rapporteur in the event of the matter being referred to it for report.
5. Having considered the matter, the Bureau of the Assembly asked the Committee on Rules of Procedure and Immunities to provide it with an opinion on this subject.
6. In its opinion of 25 January 2007, the Committee on Rules of Procedure and Immunities indicated that “given that, in [Resolution 1366 \(2004\)](#) as modified, the Assembly clearly defined the procedure for examining candidatures to the European Court of Human Rights and the criteria which the lists of candidates must meet, the procedure cannot be changed without an official amendment to the resolution. The Assembly itself must therefore decide on any change to the procedure, on the basis of a new report and a new draft resolution, which would have to be submitted to it for adoption” (see Document AS/Pro (2007) 02 revised).
7. At its meeting on 26 January 2007, after having considered the opinion of the Committee on Rules of Procedure and Immunities, the Bureau decided to instruct the Committee on Legal Affairs and Human Rights to prepare a report on the basis of the above-mentioned motion for a resolution ([Doc. 11067](#)).
8. On the same day, the matter was referred to our committee for report and to the Committee on Equal Opportunities for Women and Men for opinion.
9. On 17 April 2007, a draft resolution presented by our committee ([Doc. 11208](#)) aimed at amending paragraph 3.ii of [Resolution 1366 \(2004\)](#), as amended by [Resolution 1426 \(2005\)](#), was rejected by the Plenary Assembly.¹
10. On 17 July 2007, the Committee of Ministers requested the European Court of Human Rights (“the Court”) to provide, in accordance with Article 47 of the European Convention on Human Rights, an advisory opinion in particular on the question of the refusal by the Assembly to consider a list of candidates for the post of judge at the Strasbourg Court solely on the basis of gender-related issues.
11. On 12 February 2008, the Court came to the conclusion that “in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly’s recommendations advocating an open and transparent procedure involving a call for candidatures (see paragraph 22 above), the Assembly may not reject the list in question on the sole ground that no such candidate features on it” and that “exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible”.²

1. See in this connection Assembly [Doc. 11243](#).

2. See Advisory Opinion on certain legal questions concerning the lists of candidates with a view to the election of judges to the European Court of Human Rights, 12 February 2008, paragraph 54, at: www.echr.coe.int/echr/.

12. Subsequently, I and several other members presented a new motion for a resolution ([Doc. 11532](#)) to enable the existing rule to be waived in exceptional circumstances. On 18 April 2008 the Bureau referred this matter to our committee for report and to the Committee on Equal Opportunities for Women and Men for opinion. On 2 June 2008, the committee appointed me rapporteur.

2. Amending [Resolution 1366 \(2004\)](#) to take account of exceptional circumstances

13. In its reply to [Recommendation 1649 \(2004\)](#), the Committee of Ministers indicated that “circumstances may **exceptionally** arise in which, as a result of the correct application of the other five criteria [enumerated in paragraph 19 of the recommendation], a Contracting Party may find itself obliged to submit a list containing candidates of only one sex in derogation from that rule ... In this context, the committee draws attention to the danger that such an obligation could under certain circumstances give rise to difficulties in satisfying the requirements of Article 21 of the Convention” ([Doc. 10506](#), emphasis added).

14. The Committee of Ministers therefore invited the Assembly “to consider the possibility of modifying its own rules in order to allow **exceptional derogation** from the rule where the authorities of the Contracting Party concerned present convincing arguments to the Committee of Ministers and the Assembly to the effect that, in order to respect the requirements concerning the individual qualifications of candidates, it could not do otherwise than to submit a single-sex list” (again, emphasis added).

15. The Assembly as a whole – and its Sub-Committee on the Election of Judges to the European Court of Human Rights in particular – attach great importance to gender balance in the Court and have developed criteria in order to ensure that lists contain candidates of the sex that is under-represented in the Court. Over the years, this consistent position has proved to be successful and the number of women judges in the Court has significantly increased.³

16. The rapporteur welcomes the Court’s support of this policy. Indeed, the Court considers that the attempt of the Assembly “to achieve a certain balance between the sexes or between different branches of the legal profession on a particular list or within the Court” is “legitimate”.⁴

17. The Court underlines that “the criterion in question derives from a gender-equality policy which reflects the importance of equality between the sexes in contemporary society and the role played by the prohibition of discrimination and by positive discrimination measures in attaining that objective. The measures concerned in the present case certainly fall into the latter category. Moreover, there is far-reaching consensus as to the need to promote gender balance within the state and in the national and international public service, including the judiciary.”⁵

18. These are precisely the reasons behind the requirement of inclusion of candidates of each sex (except when the candidates belong to the sex which is under-represented in the Court) as foreseen by the Parliamentary Assembly in Article 3.ii of [Resolution 1366 \(2004\)](#), as modified by [Resolution 1426 \(2005\)](#).⁶

19. However, in view of the difficulties which may be encountered in examining a list one aspect of which leaves no procedural choice but to recommend its rejection, whereas that aspect might exceptionally be justified taking account of compliance with the other criteria for the selection of judges laid down by the Assembly, consideration should be given to providing for an exception to the rule.

20. If taken to the extreme, complying with one of the criteria laid down by the Assembly in its procedure for the selection of judges may have the contrary effect of preventing compliance with the other selection criteria.

21. In this connection, attention should be drawn to paragraph 49 of the explanatory report on Protocol No. 14 to the European Convention on Human Rights, according to which “it was decided not to amend the first paragraph of Article 22 to prescribe that the lists of three candidates nominated by the High Contracting Parties should contain candidates of both sexes, since that might have interfered with the primary consideration to be given to the merits of potential candidates. However, Parties should do everything possible to ensure that their lists contain both male and female candidates”.

3. Currently, 17 judges (36%) are women, 30 (64%) are men.

4. Paragraph 42 of the opinion

5. Paragraph 49 of the opinion.

6. See Assembly [Doc. 9963](#) on candidates for the European Court of Human Rights, 7 October 2003, rapporteur: Kevin McNamara, paragraph 37: “The Assembly has identified the need to address the under representation of women in public life throughout Europe. The rapporteur believes it is not satisfactory merely to assert that the gender balance of the Court reflects the under representation of women in the judiciary of the member states.”

22. Furthermore, in its opinion to the Committee of Ministers on 12 February 2008, the Court indicated that “in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly’s recommendations advocating an open and transparent procedure involving a call for candidatures (see paragraph 22 above), the Assembly may not reject the list in question on the sole ground that no such candidate features on it” and that “exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible”.

23. When a state has done everything possible to include members of the under-represented sex in the list of candidates – but without success because of the requirement to satisfy the other criteria – and is able to prove this with objective and reasonable explanations, the Assembly should reserve the right, under strictly defined conditions and in truly exceptional circumstances, to accept the list.

24. The state concerned will have to prove it has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21, paragraph 1, of the ECHR.

25. The rapporteur expects the criteria defined by the Assembly – a number of which have been recognised as such by the Court⁷ – to be fulfilled by the candidates. These criteria might also be enhanced by the Assembly in the future.⁸

26. There is a clear hierarchy among the various criteria for office. The Court recognises that the Assembly has a certain latitude in taking into account additional criteria,⁹ yet it is obvious that the requirements of Article 21, paragraph 1, remain the *sine qua non*.¹⁰ The Court rightly notes that even though “the Contracting Parties have, admittedly, accepted the principle of nominating candidates of the under-represented sex at the Court”, the obligation is “one of means, not of outcome”.¹¹

27. Automatic rejection of such lists would mean reducing the Assembly’s ability to choose between three candidates who satisfy the other selection criteria. Each of the candidates on the list must satisfy the conditions under Article 21, paragraph 1, so as to ensure that the Assembly has a real choice.¹² Any automatic requirement to include a female or a male candidate on a list, even if none of the potential female or male candidates satisfied the relevant criterion, would have the effect of reducing the Assembly’s choice and would be contrary to the spirit of the rules requiring gender balance on the list.

28. In exceptional circumstances justifying corresponding action, the decision by the sub-committee to accept a list of the kind in question should be approved by a two-thirds majority of the members casting a vote and a majority of the members entitled to vote of both the subcommittee and the Committee on Legal Affairs and Human Rights. This position shall be ratified by the Assembly in the framework of the progress report of the Bureau of the Assembly (after approval by the Bureau). Furthermore, in such exceptional circumstances, the Sub-Committee on the Election of Judges to the European Court of Human Rights could envisage inviting the Chairperson of the Committee on Equal Opportunities for Women and Men or his/her representative to take part as an observer (with no right to vote) in a possible exchange of views with the chairperson of the Assembly national delegation concerned.

7. The Court has recognised in its opinion that the Assembly is entitled to take into account additional criteria such as the six criteria defined in its [Recommendation 1649 \(2004\)](#). See especially paragraph 45 of the Court’s opinion (12 February 2008): “45. It is obvious too that the Assembly may take account of additional criteria which it considers relevant for the purposes of choosing between the candidates put forward by a Contracting Party and may, as it has done in a bid to ensure transparency and foreseeability, incorporate those criteria in its resolutions and recommendations. Indeed, neither Article 22 nor the Convention system sets any explicit limits on the criteria which can be employed by the Parliamentary Assembly in choosing between the candidates put forward. Hence, it is the Assembly’s custom to consider candidates also ‘with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance’ (see paragraph 29 above) ...”.

8. A report on “Nomination of candidates and election of judges to the European Court of Human Rights” is currently being prepared within the Committee on Legal Affairs and Human Rights, by Mr Christopher Chope (United Kingdom, EDG).

9. See paragraphs 43 and 45 of the Court’s opinion

10. See paragraph 51 of the Court’s opinion: “all the requirements of Article 21, paragraph 1 [must] be given primary consideration”.

11. See paragraph 51 of the Court’s opinion.

12. See paragraph 44 of the Court’s opinion.

3. Need for a technical amendment of [Resolution 1366 \(2004\)](#)

29. The Sub-Committee on the Election of Judges to the European Court of Human Rights was an ad hoc sub-committee until October 2007. It is now a permanent subcommittee (see footnote to Rule 48.6 in the Rules of Procedure of the Assembly, Strasbourg 2008, p. 72, and Document AS/Jur/Cdh (2008) 05).

30. It therefore appears necessary to amend [Resolution 1366 \(2004\)](#), as modified by [Resolution 1426 \(2005\)](#), accordingly.

4. Proposal

31. The Assembly should therefore amend [Resolution 1366 \(2004\)](#) as modified by [Resolution 1426 \(2005\)](#) by:

- i. deleting the words “ad hoc” in paragraph 1;
- ii. adding a new paragraph 4 to read as follows:

“The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21, paragraph 1, of the European Convention on Human Rights.

Such exceptional circumstances must be duly so considered by a two-thirds majority of the members casting a vote and a majority of the members entitled to vote of both the sub-committee and the Committee on Legal Affairs and Human Rights. This position shall be ratified by the Assembly in the framework of the progress report of the Bureau of the Assembly.”

Reporting committee: Committee on Legal Affairs and Human Rights.

Reference to committee: Doc. 11532 and Reference No. 3434 of 18 April 2008.

Draft resolution unanimously adopted by the committee on 24 June 2008.

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro Marcenaro, Mrs Nino Nakashidzé (Vice-Chairpersons), Mr Miguel Arias, Mr José Luis **Arnaut**, Mrs Meritxell Batet, Mrs Marie-Louise Bemelmans-Videc, Mrs Anna Benaki, Mr Erol Aslan Cebeci, Mrs Ingrida **Circene**, Mrs Alma Čolo, Mr Joe Costello, Mrs Lydie Err, Mr Valeriy **Fedorov**, Mrs Mirjana Ferić-Vac, Mr Aniello Formisano, Mr György Frunda, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana **Goryacheva**, Mrs Carina **Hägg**, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin **Hakl**, Mr Andres Herkel, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Željko Ivanji, Mrs Igllica **Ivanova**, Mrs Kateřina Jacques, Mr Karol **Karski**, Mr András **Kelemen**, Mrs Kateřina Konečná, Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych (alternate: Mr Ivan **Popescu**), Mrs Darja Lavtižar-Bebler, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mrs Ilinka Mitreva, Mr Philippe **Monfils**, Mr Felix **Müri**, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mr Anastassios **Papaligouras**, Mr Ángel Pérez Martínez, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr John Prescott, Mr Jeffrey Pullicino Orlando, Mr Valeriy **Pysarenko**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul Rowen, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Ellert **Schram**, Mr Christoph Strässer, Lord John **Tomlinson**, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem Türköne, Mr Vasile Ioan Dănuț Ungureanu, Mr Øyvind Vaksdal, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Klaas de Vries, Mr Dimitry Vyatkin, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Łukasz **Zbonikowski**.

NB: The names of the members present at the meeting are printed in bold.

See 31st Sitting, 30 September 2008 (adoption of the draft resolution, as amended); and [Resolution 1627](#).