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National procedures for the selection of candidates for the European Court of Human Rights

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

It is the Parliamentary Assembly's task, by virtue of Article 22 of the European Convention on Human Rights, to elect judges of the highest calibre to the European Court of Human Rights from a list of three candidates nominated by states parties. The Committee on Legal Affairs and Human Rights reiterates the Assembly's call that national selection procedures be rigorous, consistent, fair and transparent, in order that candidates have the necessary standing and authority. Seen from this perspective, the committee welcomes the recent initiative of the President of the Court to set up a panel to advise governments before lists of candidates are transmitted to the Assembly.

1. Reference to committee: Bureau decision, Reference 3699 of 25 June 2010.

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A. Draft resolution[2]

1. It is the Parliamentary Assembly's task, by virtue of Article 22 of the European Convention on Human Rights (ETS No. 5) ("the Convention"), to elect judges of the highest calibre to the European Court of Human Rights (the Court) from a list of three candidates nominated by states parties. This provides "democratic legitimacy" to judges elected by the Assembly.

2. This presupposes that states parties to the Convention transmit to the Assembly a list of three jurists with the necessary qualifications, experience and stature, as required by Article 21, paragraph 1, of the Convention ("The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence"), so that member states, and in particular their highest judicial authorities, fully acknowledge the Court's authority.

3. Hence, in order to be in a position to choose between candidates with the necessary standing and authority, the Assembly reiterates the need for rigorous, consistent, fair and transparent national selection procedures, as specified in its Resolution 1646 (2009) on the nomination of candidates and election of judges to the Court.

4. It follows that, as "[t]he authority of the Court is contingent on the stature of judges and the quality and coherence of the Court's case law" (paragraph 7 of Assembly Resolution 1726 (2010) on the effective implementation of the European Convention on Human Rights: the Interlaken process), the Assembly fully supports all attempts by states parties to enhance the quality of candidates transmitted to it, in particular by improving, where necessary, national selection procedures. Seen from this perspective, the recent initiative of the President of the Court to set up a panel to advise governments before lists of candidates are transmitted to the Assembly is welcome.

2. . Draft resolution adopted by the committee on 5 October 2010.

B. Explanatory memorandum by Mrs Wohlwend, rapporteur

1. Introduction

1. On 9 June 2010, the President of the European Court of Human Rights ("the Court"), Mr Jean-Paul Costa, wrote a letter to the Permanent Representatives (Ambassadors) of all Council of Europe member states suggesting the possibility of setting up an advisory panel of experts to advise governments on the suitability of candidates for election as judges of the Court, having regard to the criteria stipulated in Article 21, paragraph 1, of the European Convention on Human Rights ("the Convention"). The text of the said letter is appended to the present report.

2. This initiative was subsequently brought to the attention of the Bureau of the Parliamentary Assembly which, on 15 June, referred the matter for report to the Committee on Legal Affairs and Human Rights, with a request that the report be discussed by the Assembly at its October 2010 part-session. At its meeting on 16 and 17 September 2010, the committee appointed me rapporteur.

2. National procedures for the selection of candidates

3. The Committee on Legal Affairs and Human Rights has relatively recently undertaken a comprehensive study of this subject, which resulted in the adoption, by the Assembly, on 27 January 2009, of Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights.[3] The rapporteur's analysis, to which was appended an overview of national selection procedures, provides an excellent evaluation of this topic.

4. Rather than trying to repeat – in the present report – what I understand to be the Assembly's position on this subject, I have decided to simply quote, verbatim, from the text of Assembly Resolution 1646 (2009):

> *"1. The Parliamentary Assembly, whose task, by virtue of Article 22 of the European Convention on Human Rights (ETS No. 5 – the Convention), is to elect judges of the highest calibre to the European Court of Human Rights (the Court) from a list of three candidates nominated by states parties, underlines the importance of appropriate national selection procedures in order to ensure and reinforce the quality, efficacy and authority of the Court.*
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> *2. Despite a marked improvement in national selection procedures in several countries, there is still significant variance as concerns fairness, transparency and consistency. Referring to its Recommendation 1649 (2004) on candidates for the European Court of Human Rights, the Assembly yet again reiterates that the process of nominating candidates to the Court must reflect the principles of democratic procedure, transparency and non-discrimination. In the absence of a real choice among the candidates submitted by a state party to the Convention, the Assembly shall reject lists submitted to it. In addition, in the absence of a fair, transparent and consistent national selection procedure, the Assembly may reject such lists.*
>
> *3. In addition to the criteria set out in Article 21, paragraph 1, of the Convention ("The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence"), the Assembly has introduced linguistic requirements based on Article 21, paragraph 1, of the Convention, the need for gender balance, as well as other requisites, such as the standard curriculum vitae for candidates. Before proceeding to the election of judges, the Assembly also invites candidates to take part in personal interviews before a sub-committee set up for that purpose.*
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> *4. Referring to the above-mentioned Recommendation 1649 (2004), the Assembly recalls that in addition to the criteria specified in Article 21, paragraph 1, of the Convention, as well as the gender requirement, states should, when selecting and subsequently nominating candidates to the Court, comply with the following requirements:*
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> *4.1. issue public and open calls for candidatures;*
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> *4.2. when submitting the names of candidates to the Assembly, describe the manner in which they were selected;*
>
> *4.3. transmit the names of candidates to the Assembly in alphabetical order;*

3. . See also Assembly Doc. 11767 (rapporteur: Mr Christopher Chope).

4.4. candidates should possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other (see model curriculum vitae appended hereto);

4.5. that, if possible, no candidate should be submitted whose election might result in the necessity to appoint an ad hoc judge.

5. The Assembly also strongly urges the governments of member states which have still not done so, to set up – without delay – appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicised processes in the nomination of candidates. Furthermore, it invites the governments of member states to ensure that the selection bodies/panels (and those advising on selection) are themselves as gender-balanced as possible ..."

5. Also, more recently, on 29 April 2010, in its Resolution 1726 (2010) on the effective implementation of the European Convention on Human Rights: the Interlaken process,[4] the Assembly had the opportunity to reiterate its position on this subject, when it clearly expressed the view that:

"7. The authority of the Court is contingent on the stature of judges and the quality and coherence of the Court's case law. In this context it is the Assembly's responsibility to elect judges of the highest calibre to the Court from a list of three candidates nominated by states parties. Recalling its Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, the Assembly reaffirms its call that national selection procedures must be rigorous, fair and transparent in order to enhance the quality, efficacy and authority of the Court."

6. Additional information on this subject, and on the manner in which the Assembly carries out its crucial task in electing judges, is available on the Assembly's website, as well as in the report of Mr Chope, referred to above.[5]

3. Proposal to set up advisory panel to advise governments

7. For the background "history" of this proposal, please consult the text of the letter of the President of the Court, dated 9 June 2010, appended to this report.

8. The President of the Assembly and I, in my capacity as Chairperson of the Assembly's Sub-Committee on the Election of Judges to the European Court of Human Rights, have had separate meetings with President Costa, who has explained to us the details of his proposal. I also have it to understand that the Committee of Ministers (more specifically, its Ad hoc working party on the follow-up process to the Interlaken Declaration) has already been provided with a draft (Committee of Ministers) resolution on this topic.

9. Briefly put, the idea mooted by President Costa is the creation of an advisory panel of seven persons, from among former judges of the Strasbourg Court, other international courts, members of the highest national courts and lawyers of recognised competence. The panel would need to be geographically and gender balanced. Members of the panel, appointed by the Committee of Ministers for a term of three years, renewable once (upon proposal of the Court's President), would (and here I quote from President Costa's appended letter), "intervene before a list was submitted to the Assembly by the contracting party so as not to interfere with Assembly's Convention responsibilities in this area. Moreover, its role would be advisory; in other words it would make recommendations to the nominating state including, as necessary, proposals to modify the list. Such a panel could be set up without amending the Convention by a decision of the Committee of Ministers."

10. My understanding of the manner in which the proposed panel of experts would function is this: the panel would provide advice to governments by examining the curriculum vitae of the candidates selected before transmission of the list of the three candidates to the Assembly. This procedure would be obligatory.[6] If the panel were to find, after an examination of the curriculum vitae, that the list to be forwarded to the Assembly is composed of suitable candidates, it would so inform the state concerned without further

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4. . See also Assembly Doc. 12221, presented by the Committee on Legal Affairs and Human Rights (rapporteur: Mrs Marie-Louise Bemelmans-Videc).

5. . See "Procedure for electing judges to the European Court of Human Rights", document AS/Jur (2010) 12 rev 2, of 15 June 2010 http://assembly.coe.int/CommitteeDocs/2010/20100504_ajdoc12rev.pdf, as well as an overview of the procedure for the election of judges onto the Strasbourg Court, provided by the head of the Assembly's Legal Affairs and Human Rights Department, published in the European Human Rights Law Review (ed. J. Cooper, Sweet & Maxwell, 2010), Issue 4, at pp. 377-83.

6. . Note, in this connection, the now defunct "informal [voluntary] procedure for the examination of candidates for the election of judges" set up by the Committee of Ministers back in 1997: Decision adopted on 28 May 1997.

comment. If, however, the panel were of the view that one or more of the persons on the list (to be) put forward to the Assembly was not suitable, it would provide its views, in a confidential procedure, to the state concerned, indicating to it why the said person or persons should not be on the list. Then, if ever the state concerned were not to heed the "advice" of the panel and transmit, to the Assembly, a list containing one or more persons deemed by the panel not to meet the criteria for office – as provided in Article 21, paragraph 1, of the Convention, – the panel would inform the Assembly of its reasons.

11. This initiative by President Costa is welcome, in that the clear intention behind it is to ensure that lists transmitted to the Assembly consist of three candidates of the highest quality (see paragraphs 4 to 6 above, and President Costa's appended letter). That said, even if I am of the view that this, and any other attempt to help us – the states concerned and the Assembly – ensure that lists of candidates transmitted to the Assembly are composed of three jurists of outstanding calibre, certain critical comments can nevertheless be made with respect to this proposal. This idea, modelled on the independent panel (Article 255 of the Treaty on the Functioning of the European Union) set up with the entry into force of the Lisbon Treaty, relates to another type of "animal". Under the European Convention on Human Rights it is the Assembly which elects judges from a list of three persons (in other words, it has a choice: Article 22), whereas the European Union panel looks at the suitability of (single) candidates put forward for appointment by governments to the Court of Justice of the European Union.[7] Election of judges by the Assembly, in the Strasbourg system, provides "democratic legitimacy", something which no other international court possesses. Similarly, states parties to our Convention might consider such a "hybrid creation" as an inappropriate interference in their own national, hopefully rigorous, transparent and fair, selection procedures (as might also the Assembly, were it ever suggested that such a panel provide the Assembly, rather than states parties, with advice).[8] That said, as the initiative of President Costa is made in the spirit of enhancing the quality of candidates to be transmitted to the Assembly, I believe that this proposal is worthy of serious consideration.

12. Whether or not President Costa's proposal is accepted by the Committee of Ministers (that is to say, member states), we – the Committee on Legal Affairs and Human Rights, and the Assembly as a whole – must remain vigilant and continue to ensure, to the extent that we can, that national selection procedures are fair, transparent and consistent, so that we are able to choose and to elect judges of the highest calibre.

13. This leads onto another, related question. Should our parliaments not be more involved and pro-active in national procedures for the selection of candidates? This is a question which merits consideration, but in another, separate report.[9]

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7. . For additional information concerning the European Union panel – explicitly foreseen in European Union primary law – see Council Decision 2010/124/EU (to which are appended the operating rules of the panel), and Council Decision 2010/125/EU.

8. . As the Assembly's Sub-Committee on the Election of Judges to the European Court of Human Rights undertakes interviews with all candidates prior to election (see footnote 3, above, for details; interviews are also often held during the national selection process), it would be important to ensure that this new advisory panel, if created, operates only by means of a written procedure. See Rule 7 (Hearing) of the operating rules of the European Union panel.

9. . In certain states parties, parliamentarians are directly involved in national nomination procedures: see, in this connection, the Chope report, referred to in paragraphs 3 and 6 above, passim, as well as a keynote speech of the Vice-President of the Committee on Legal Affairs and Human Rights, Serhiy Holovaty, at a hearing organised by the European Parliament's Committee on Constitutional Affairs in Brussels on 18 March 2010 on the subject of European Union accession to the European Convention on Human Rights:
www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf, at pp. 4 and 5.

Appendix - Letter from Mr Jean-Paul Costa, President of the European Court of Human Rights, addressed to member states' Permanent Representatives (Ambassadors) on 9 June 2010

Dear Ambassador,

As you know, point 8 of the Interlaken Action Plan calls upon the states parties and the Council of Europe to "ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language."

In terms of the future of the Court and therefore the Convention system, one of the decisive factors will be the quality of its Judges. Whatever reforms are undertaken, the system will fail if judges do not have the necessary experience and authority.

The quality of the Judges is important not only to guarantee the high standard of the decisions delivered and the jurisprudence developed. It is also essential because, in a subsidiary system where human rights protection falls primarily to the national courts, the European Court as the ultimate arbiter of human rights issues must be composed of persons of sufficient standing and authority to command the respect of national judges, including senior national judges. If this is not the case, the Court itself will suffer from a deficit of authority and the system will lose credibility and effectiveness.

This aspect is also particularly important in view of the prospect of the European Union's accession to the Convention. One of the critical issues in this context will be the future relationship between the Court of Justice of the European Union and the Strasbourg Court. For that relationship to function it must be based on mutual respect. Since the entry into force of the Lisbon Treaty, appointments to the EU courts are subject to the opinion of an independent panel (Article 255 of the Treaty on the Functioning of the European Union). It is true that the procedure under the Convention is not strictly comparable to the EU appointment process in view of the involvement of the Parliamentary Assembly of the Council of Europe and the additional guarantee which that provides.

It is worth recalling that the Group of Wise Persons in its 2006 report envisaged the screening of candidatures "by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence" (§ 118 of the report). Moreover, in his contribution to the Interlaken Conference the Secretary General made a similar proposal (§ 18).

As regards the Convention's criteria for office, Article 21 § 1 provides that "judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence". These requirements have remained unchanged since the adoption of the Convention in 1950.

These terms are susceptible to some degree of objective definition. High judicial office means that the persons concerned must be eligible for membership of one of the country's senior courts. Thus, for example, members of Supreme, Constitutional, Supreme Administrative Courts clearly satisfy this requirement, whereas persons eligible for appointment only to the lowest level of jurisdiction in principle do not.

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

The states clearly have a fundamental role in ensuring that the three candidates whose names are submitted to the Parliamentary Assembly are all suitably qualified so as to offer the Assembly a real choice between candidates of an equivalent standing and to guarantee that, whichever of the candidates is elected, he/she will have a sufficient level of expertise in a relevant field of law (international law, criminal law, administrative law, humanitarian law, etc.). To achieve this means setting up a fair and transparent procedure at national level. This has already been recommended by the Parliamentary Assembly and it is important that this recommendation is fully implemented.

However, this is not enough. That is why I would urge the Committee of Ministers to set up rapidly a panel along the lines proposed by the Wise Persons and the Secretary General. Such a panel, which should be composed of senior figures from a relevant background, would intervene before a list was submitted to the PACE by the contracting party so as not to interfere with the PACE's Convention responsibilities in this area.

Moreover, its role would be advisory; in other words it would make recommendations to the nominating state including, as necessary, proposals to modify the list. Such a Panel could be set up without amending the Convention by a decision of the Committee of Ministers.

I intend to raise this matter as soon as possible with the President of the PACE. I very much hope that you and your colleagues, Ministers' Deputies, will be able to discuss this important issue in the near future.

For my part, I am prepared to make more detailed proposals on the operation of the Panel and the appointment of its members.

With my very best wishes,

signed:

Jean-Paul Costa