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Nomination of candidates and election of judges to the European Court of Human Rights

Committee Opinion[1]
Committee on Equal Opportunities for Women and Men
Rapporteur: Ms Lydie ERR, Luxembourg, Socialist Group

A. Conclusions of the committee

The committee underlines the importance it attaches to gender-balance on the European Court of Human Rights, and to fair and transparent selection and nomination procedures for candidates to the post of judge on the Court.

The committee supports the draft resolution tabled by the Committee on Legal Affairs and Human Rights. It suggests three amendments to reinforce the gender equality dimension of the text.

B. Proposed amendments

Amendment A (to the draft resolution)

At the end of paragraph 1, add the following words:

> *"including gender balance in its midst".*

Amendment B (to the draft resolution)

At the end of paragraph 5, add the following sentence:

> *"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."*

Amendment C (to the draft resolution)

At the end of paragraph 5, add the following new paragraph:

> *"The Assembly urges its political groups to strive for a gender-balanced composition of the Assembly's Sub-Committee on the Election of Judges."*

1. See Doc. 11767 tabled by the Committee on Legal Affairs and Human Rights.

C. Explanatory memorandum by the rapporteur, Ms Err

1. The Parliamentary Assembly is very much attached to the principle of gender equality. It believes that a society can be fully democratic and make full use of its potential only if both women and men are properly represented in decision-making bodies, including the judiciary. On international judicial bodies, women are traditionally under-represented, which can be a threat to these bodies' legitimacy and authority.

2. The gender imbalance on the European Court of Human Rights is slowly being righted, though it continues to exist today (15 of the 45 judges on 1 December 2008 were women, i.e. 33%, up from 11 of 44 judges on 1 March 2005, i.e. 25%). Since the Parliamentary Assembly imposed the inclusion of a member of the under-represented sex on candidate lists for the Court in 2004[2], the proportion of women on candidate lists has gone up considerably, and with it, the proportion of women elected to the Court[3].

3. The nomination of candidates at national level is, however, far from being a transparent process in many countries. This makes it very difficult to judge whether women are being discriminated against in the selection procedure at national level.

Open call for candidatures at the national level

4. Even the most basic requirement for a fair and transparent selection procedure, an open call for candidatures, is not organised in all member states. The legal profession (and, in particular, the judiciary) has a reputation as being conservative in many countries. In these countries, it has taken years for women to reach the highest echelons of the legal profession – indeed, in some countries, women have yet to reach such positions. If no open call for candidatures is held, names of female candidates may thus not simply "spring to mind" to those selecting the candidates.

5. Similarly, it is important that the open call for candidatures is conducted in a way which does not discriminate against women. To take an example, having held judicial office is not a requirement for becoming a judge at the European Court of Human Rights (some of the most revered judges of the European Court of Human Rights were, in fact, working as lawyers or in academia before their election to the Court). In a country where few women have held judicial office, it would thus be clearly discriminatory to add such a requirement to the open call for candidatures at national level.

The selection process at the national level

6. From a gender equality point of view, who makes the selection among the qualified candidates at national level is a decisive factor. Only a minority of states involve (a panel of) independent experts, at some level of the selection process. The final decision is usually taken by a minister or a governmental body (Ministry of Justice, Ministry of Foreign Affairs, Council of Ministers, or other).

7. The proportion of women at the highest decision-making level in the Ministries of Justice, the Ministries of Foreign Affairs and the Councils of Ministers of most member states still leaves much to be desired. The composition of selection panels (including panels of independent experts) is also rarely gender-balanced. Countries which have not advanced that much in terms of gender equality in the past years will thus often resort to the "old-boys-network" in the selection process, and will thus "find it hard" to "find" qualified women – because they are unknown to the (male) decision-makers in question.

8. Even in countries which are more advanced in terms of gender equality, the odds may be stacked against qualified female candidates if the decision-makers (or even the independent experts advising on the selection) are predominantly men. The discrimination against women does not have to be conscious: in the same way as subconscious racial bias leads to discrimination against minorities in recruitment panels (proven in many studies), subconscious gender bias can lead to discrimination against women in such panels. Only gender-balanced selection panels are able to overcome such bias and discrimination.

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2. Since the adoption of Resolution 1627 (2008) on Candidates for the European Court of Human Rights, the Assembly can decide "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 § 1 of the European Convention on Human Rights" (paragraph 4).

3. It will be recalled that, from the creation of the new Court in 1998 until the adoption of Resolution 1366 (2004), nearly 60% of the lists submitted by the High Contracting Parties were all-male, and nearly 90% had a majority of male candidates on their lists. While a majority of candidate lists since the adoption of that Resolution still feature a majority of male candidates, all-male candidate lists are now the exception rather than the rule, thus giving the Assembly the choice of electing a female judge if it so wishes. There has also been an increase in the number of all-female candidate lists.

9. It should also be noted that there are countries which have put into place quota-systems at the national level, including with regard to judges on the Supreme Court and the Constitutional Court. Thus, for example, Austria's Law on Equal Treatment for Public Services[4] foresees not only that, in case of equal merit, the woman has to be appointed, but also that affirmative action is taken via quotas. Thus there is a special regulation of the Federal Ministry of Justice on the Promotion of Women within the Judiciary, covering the period until 1 January 2010[5]. According to this regulation, which aims at raising the representation of women in all positions within the judiciary, women are considered "underrepresented" if the number of women employed in an organisational unit within the judiciary is below 40%. In this case, binding requirements for periods of 2 years are defined to raise the quota step by step up to 40%. This regulation also applies to the Supreme Court.

10. This binding regulation, which constitutes a quota of outcome (not only of candidatures, as was introduced by the Assembly in 2004) has also had an effect on the gender-balance on Austria's Constitutional Court, to which the regulation does not apply, by creating an environment in which more and more women are appointed to the highest judicial office of the country (appointments which have a political dimension). In Belgium, there is a requirement that both sexes be represented on the Constitutional Court[6], again a quota of outcome. Other countries have more general gender-balance requirements, such as Bosnia and Herzegovina[7] or Latvia[8], or have a statutory duty to have regard to the need to encourage diversity in the range of persons available for selection for judicial appointments (United Kingdom).

11. More countries may want to follow Austria's and Belgium's example. Why not constitute a quota of outcome (for candidatures to the European Court of Human Rights) at national level, stipulating that at least two of the three candidates proposed to the Assembly have to be women, at the national level, until women are no longer under-represented on the European Court of Human Rights?

Procedures before the Parliamentary Assembly

12. The gender-balance on the Sub-Committee for the Election of Judges (as of its parent Committee, the Committee on Legal Affairs and Human Rights[9]) is heavily skewed towards men. As only gender-balanced selection panels are able to overcome (often subconscious) gender bias and discrimination, it would be desirable that the political groups (which nominate the members on the Sub-Committee) put forward more women parliamentarians for membership on the Sub-Committee.

13. The "electoral college" itself being the Parliamentary Assembly, it would, of course, also be desirable that more women parliamentarians be chosen at the national level to be part of the Assembly. This would have positive effects in other areas of the Assembly's work, as well.

Ad hoc judges

14. *Ad hoc* judges replace a country's sitting judge when, for example, there is a conflict of interest which prevents the sitting judge from ruling on a case brought before the European Court of Human Rights[10]. These *ad hoc* judges are nominated directly by member states pursuant to Article 27 of the European Convention of Human Rights, without any involvement of the Assembly, "thus giving rise to legitimacy and independence issues", as the Rapporteur of the Committee on Legal Affairs and Human Rights rightly notes[11].

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4. Bundes-Gleichbehandlungsgesetz, StF: BGBI. Nr. 100/1993.
5. Frauenförderungsplan für das Justizressort.
6. Article 34§5 of the law of 6 January 1989 on the Constitutional Court.
7. The Law on the High Judicial and Prosecutorial Council stipulates that: "Appointments to all levels of the judiciary should also have, as an objective, the achievement of equality between women and men."
8. The Law on the Judiciary (Article 44) stipulates that the principal of equal gender representation shall be taken into account when approving the composition of the Supreme Court Senate, the composition of the Supreme Court chambers, when electing Chairpersons of the Supreme Court departments and chambers, when electing Vice-Chairpersons of the Supreme Court, as well as when electing the Supreme Court Plenary.
9. The Committee on Legal Affairs and Human Rights only plays a role in the Parliamentary Assembly procedure when a country submits a candidate list composed only of members of the overrepresented sex, and exceptional circumstances must be established in accordance with Resolution 1627 (2008).
10. The need to appoint an *ad hoc* judge may also arise when a sitting judge resigns from the Court (or dies), and is not able to continue working on cases, to cover cases until a new judge is elected by the Assembly.
11. Explanatory memorandum by Mr Christopher Chope, Doc. 11767, paragraph 33.

15. The figures for *ad hoc* judges for 2007 and 2008 show that the appointment of *ad hoc* judges directly by member states may also give rise to gender equality issues, as only 8 of the 27 (30 %) *ad hoc* judges appointed in 2008 were women (though 15 of the 27 (56 %) appointed in 2007 were women)[12].

16. Obviously, it would be better if more women were appointed *ad hoc* judges, but the ideal solution would, in fact, lie in a reduced number of *ad hoc* judges (by, for example, having recourse to a sitting judge elected for another member country, as the Rapporteur of the Committee on Legal Affairs and Human Rights suggests[13]) or in a new procedure which gives the Assembly more influence over the choice of *ad hoc* judges.

Conclusions and recommendations

17. In conclusion, to ensure a better gender-balance on the European Court of Human Rights and avoid discrimination against women amongst the candidates for the post of judge on that Court, I would recommend that member states:

i. organise fair and transparent selection procedures, which include open calls for candidates;

ii. ensure that the selection bodies/panels (and those advising on selection) are as gender-balanced as possible;

iii. consider putting into place quotas of outcome on the national level, stipulating that at least two of the three candidates proposed to the Assembly have to be women, until women are no longer under-represented on the European Court of Human Rights;

iv. appoint more women parliamentarians members of the Parliamentary Assembly.

18. For the same reason, political groups should put forward more women parliamentarians for membership on the Sub-Committee on the Election of Judges (of the Committee on Legal Affairs and Human Rights).

Reporting committee: Committee on Legal Affairs and Human Rights.

Committee seized for opinion: Committee on Equal Opportunities for Women and Men

Reference to committee: Doc. 11028 and 11029, Reference No. 3279 of 6 October 2006

Opinion adopted by the committee on 26 January 2009.

Secretariat of the committee: Mrs Kleinsorge, Mrs Affholder, Mrs Devaux

12. Figures provided by the Registry of the European Court of Human Rights.
13. Ibid, paragraph 35.