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Editorial



President Geert J.M. Corstens

It is my pleasure to present the activities we have planned for 2013 in the first issue of our Newsletter for this year. Essentially, we anticipate pursuing the discussions embarked upon in 2011 with the European Court of Justice on dialogue with the supreme courts in the area of fundamental rights, while broadening it to include the European Court of Human Rights also. The European Charter on Human Rights is an opportunity for renewed dialogue as well as being an additional legal source for national judges. In this new context, the interpretation of fundamental rights by the two European Courts will probably require closer interaction with national supreme courts to develop a common, harmonised jurisprudence. Our colleague from the Finnish Supreme Court, Ms Koskelo, has already issued an invitation for us to gather in Helsinki for this first meeting in a new cooperation cycle. We offer her our sincere thanks.

We will also continue our cooperation with the European institutions, particularly with respect to the Common Portal of Jurisprudence, for which a follow-up and information meeting was held at the European

working group on the Network's online activities, the Website and the Common Portal of Jurisprudence, of which Mr Herrmann, Justice in the German Supreme Court, has been appointed Chairman, held two meetings in Paris. We look forward to receiving his report.

In this issue, you will find the statement by Lord Mance, of the United Kingdom Supreme Court, at our last Colloquium in Paris in October 2012 on the appointment of judges in the European Courts, based on his experience as a member of the Article 255 Committee of the Lisbon Treaty.

The nomination of judges to the Court of Justice of the European Union and the European Court of Human Rights

Lord Mance*

Introduction

1. The Court of Justice, with its unparalleled transnational power, has cemented European development. Its activity has expanded far beyond the original common market concept. The quality and expertise of its judicial membership is of great importance, in both the Court itself and its General Court with their differing workloads. So too, of course, is the quality and expertise of judges at the European Court of Human Rights with its different, though for the European Union, increasingly relevant workload.

2. Until recently, appointments to international courts were the closely guarded preserve of appointing states. This was particularly so with the Court of Justice when each member state of the EC (now EU) had and has the right to nominate a judge (albeit sometimes, as with Advocate Generals, the right only arises intermittently). The actual appointment had to be by common accord (i.e. unanimity) of all member states, but in practice, and so far as appears, no nominee was ever rejected. It was to a large extent also so with the European Court of Human Rights, where the practice has been for states submit a list of three to the Council of Europe, from which the Council's Assembly chose after a review of the list by a committee of members of the Assembly.

3. The risks of such systems are evident. States' choices could be influenced by political, rather than judicial considerations. Nominations might be sought and gained more for the status and emoluments attaching to European judicial office, than for judicial reasons. The national appointments procedure might not appreciate or evaluate the particular expertise that a judge in the Luxembourg or Strasbourg court would need to have or be able to acquire. The quality of that court and its decisions might be affected. The confidence of national courts, essential to the operation of the European Union and the European Convention on Human Rights, might suffer. Increased attention began to be paid by academics and practitioners to these risks (1).

The Treaty of Lisbon

4. The Treaty of Lisbon introduced a new era in the EU. Under TFEU Article 255, a panel was established to give an opinion on candidates' suitability to perform the duties of Judge or Advocate-General as the case might be, before appointment by the governments of Europe. It must comprise of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. Such members serve for four years, renewable once only. The prescribed composition makes

very clear States? interest in ensuring a judiciary capable of meeting the practical demands faced by a serving judge on the Court of Justice. Article 255 also requires the Council to establish the panel's operating rules and appoint its members, acting on the initiative of the President of the Court.

5. Under the operating rules, the General Secretariat of the Council acts as the panel's secretariat. Every nomination is forwarded to the panel, which may ask the nominating government for additional or other material. The panel must have a quorum of five. It must hear each candidate for a first appointment to a particular post, but we interpret the relevant rule as meaning that it cannot hear any candidate for renewal in a particular post. The hearing must take place in private and the panel's deliberations must take place in camera. The panel's opinion must set out the principal grounds on which it is based. The opinion is forwarded to the governments of the EU. The panel's president may be asked to present it to them in Council.

6. The panel's chair is M. Jean-Marc Sauvé, Vice-President of the Conseil d'Etat, two former members of the Court or General Court, three members or former members of constitutional or supreme courts (including myself) and Ana Palacio, former Spanish foreign minister, nominated by the European Parliament. We commenced our activity in March 2010, and issued a first report a year later, in a full version for the governments and in a slightly edited version for the public. The editing withheld from public view any data which could throw light on the history of particular applications or the nature of particular opinions(2). Since then, journalists and others have published supposed data in that connection. I shall observe the same restraint as our first report. But both nominations and appointments are public, and, since we started our activity, there have been in the Court itself five first appointments as Judges and two as Advocate-General, together with twelve renewals as Judges and two as Advocate-General, and in the General Court six new appointments and eleven renewals.

7. The Treaty of Lisbon, like its predecessors, contains some fairly formal requirements regarding eligibility for appointment. Under article 252, appointees to the Court itself must be "persons whose independence is beyond doubt and who possess the qualifications for appointment to the highest judicial offices in their respective countries or who are jurisprudents of recognised competence". Under article 254, appointees to the General Court must now "possess the ability required for appointment to high judicial office"(3). But Article 255 requires a more general judgment on the suitability of candidates to perform the duties required as Judge or Advocate-General in the Court of Justice.

The Article 255 panel's approach

8. In our first report, we explained how we saw our task. We obtain from the government not only its written motivation, but also the candidate's, accompanied by information about the candidate's publications and wherever possible at least one such recent publication in French or English. We may also consult other publications by the candidate. We will not take into consideration any material of an unfavourable nature which comes or is brought to our attention without questioning the candidate about their substance.

9. An important feature of the panel's practice is to enquire of each nominating state whether any national selection committee was constituted, and, if it was, of whom it consisted and what its recommendations were. No particular national process is required under the European Treaties. But the existence of an objective appointments procedure independent of executive influence may provide the panel with some assurance about the quality of a candidate. In its absence, there may be nothing to redress an unfavourable view otherwise formed on the basis of the documentary material and hearing. There are signs throughout Europe that member states are becoming conscious that it is in their own interests to introduce such processes.

10. The hearing by the panel of any candidate seeing first time appointment lasts an hour. The candidate is asked to justify his or her candidature during the first ten minutes, and then to answer questions, so far as possible in either of the two languages, French and English, which are used in questioning. Other candidates nominated for renewal are considered on paper at a panel meeting. The annual report identifies specific aspects at which the panel looks under the heads: (i) juridical capabilities, (ii) professional experience, (iii) aptitude to exercise the functions of a judge, (iv) independence and impartiality and (v) linguistic capabilities and ability to work in an international environment in which different legal traditions are represented.

11. Under (i), juridical capabilities, the panel attaches relevance to an understanding of EU law; it is interested in a candidate's capacity for reflection upon the conditions and mechanisms of application of EU law, in particular in the internal systems of Member States, as well as upon the challenges currently faced by EU law. It would expect a candidate to demonstrate a basic understanding of and an appropriate ability to analyse and reflect on general questions relating to EU law. Any candidate ought on any view to be able without unreasonable delay to participate efficiently and effectively in the handling of cases in the relevant court.

12. Under (ii), professional experience, the panel has suggested that, speaking generally, it could be difficult to be satisfied with high level experience of less than 20 years in the case of a judge of the Court of Justice or advocate general or of less than 12 or more years in the case of a judge at the General Court, but that such experience could be as advocate, university professor or high functionary or of another professional nature.

13. As to (iii), aptitude, in addition to the juridical capabilities mentioned in (i), the panel will look for understanding of the role and scope of the functions of the post sought, clarity of analysis and expression, a practical grasp, as well as an ability to discuss issues in a collegiate atmosphere.

14. As to (iv), independence and impartiality, the panel will examine closely the material before it regarding the candidate's career, as well as the candidate's interview for any reserves on this score.

15. As to (v), any candidate for the Court should already master or be able without unreasonable delay to master French, the working language of the Court. The panel regards the mastery of more than one of the EU's official languages as a positive, even not determining, element, especially for the light it may throw on a candidate's ability to work in an international environment. Similarly positive elements in this connection may be the publication of texts in a language other than the candidate's maternal language, participation in international meetings, seminars or colloquies, and evidence of an understanding of the nature, principles and concerns of Member States other than his or her own.

The scope of the panel's role

16. The panel's role and functions have obvious limits:

a. it only considers one candidate at a time. Its role is to give a positive or a negative opinion on the suitability of that one candidate. It does not and cannot choose between candidates;

b. so it can be no part of its role to shape the composition of the Court of Justice, or to favour any particular skill, experience or expertise; nothing in the European Treaties parallels the provisions of the Rome Statute for the International Criminal Court, specifically requiring states to give attention to the balance of skills, experience and gender on that Court; this leaves it to at best the law of averages, whether the Court gets the benefit of any particular characteristics or skills;

c. the panel is only concerned with appointments or renewals; it can do nothing about non-renewals, of which there have from time to time been some which have been attributed to political reasons.

The European Court of Human Rights

17. The European Court of Human Rights affords an interesting comparison with the Court of Justice. In some respects the Council of Europe has gone further or faster than the EU. In others it has followed and done so on a more limited basis.

18. First, Council of Europe bodies have pro-actively, and with results, addressed the question of gender balance. They have required the three-name lists submitted by governments to contain at least one member of an under-represented sex (4); and, on 12 February 2008 the Strasbourg Court, in the first of two advisory opinions relating to the election of judges - after confirming that it was vital to the Court's authority and the quality of its decisions that any candidate must meet the Convention criteria that they 'shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognised competence' - went on to say that, provided that he or she satisfies these criteria, there is nothing to prevent the member states from taking into account other criteria or considerations such as achieving 'a certain balance between the sexes or between different branches of the legal profession or within the Court' (para 42), not only when choosing between candidates on a list, but also when assessing the appropriateness of a list presented. The Council of Europe's gender requirements and admonitions have had their intended effect. Over 40% of the Court's judges are women.

19. Second, the problem of renewal of judges' mandates has also been addressed. After a long delay, Protocol No 14 to the Convention has come into force, and judges will have a single non-renewable nine year term for the future. (One can, however, have a concern about the shortness of this term - whether it gives sufficient time for suitable presidents of the court and of its chambers to emerge and hold office for any significant period.)

20. Thirdly, by Resolution CM/Res(2010)26 of 10th November 2010, the Committee of Ministers followed the EU's lead, by establishing a seven-person panel with the mandate 'to advise the High Contracting Parties whether candidates for election as judges of the [ECtHR] meet the criteria stipulated in Article 21 para 1 of the [ECHR]' (para 1). Its members are to be 'chosen from among members of the highest national courts, former judges of international courts, including the ECtHR and other lawyers of recognised competence, who shall serve in their personal capacity', with the further provision that 'The composition of the panel shall be geographically and gender balanced'. In fact, it consists in five men, including the former President of the ECtHR, Lucius Wildhaber, and two women. So too does the Article 255 panel, a feature I only mention now that Strasbourg has repeated it!

21. Fourthly, the Committee of Ministers at their meeting on 28-29 March 2012 issued Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, accompanied by a detailed Explanatory Memorandum (5). These address selection procedures at national level for such candidates. The criteria specified include the basic requirements of high moral character, and the qualifications for high judicial office or capacity of a jurist of recognised competence, as well as knowledge of the national legal system(s) and of public international law, with practical legal experience also being 'desirable'. Further, 'as an absolute minimum', they require proficiency in one of the two official languages of the Court, with the addition that candidates 'should also possess at least a passive knowledge of the other'.

22. More radical are the stated criteria relating to the national procedure for eliciting applications. This must

- a. be 'stable and established in advance through codification or established administrative practice' and made public,
- b. involve a widely available public call for applications and, if necessary, further positive steps to ensure a sufficient number of good applicants,
- c. if it involves proposals by third parties, include safeguards to ensure that suitable candidates are not put off and that all applicants are considered fairly and impartially,

Further, there should be a balanced, expert and impartial recommending body, which could seek relevant information from outside sources, and should interview all serious candidates (or, if numbers so require, draw up and interview all those on a shortlist) using a standardised format and testing linguistic ability. Finally, any departure by the final decision-maker from this body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.

Differences between the Luxembourg and Strasbourg panels

23. The panels introduced in respect of the Luxembourg and Strasbourg Courts have differently phrased functions. The article 255 panel gives 'an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court'. This, according to the language, involves considering both whether the formal requirements of articles 253 and 254 are satisfied and generally whether a candidate is suitable. The Strasbourg panel's 'mandate' is defined (by Resolution CM/Res(2010)26 establishing) as being simply to advise Council of Europe states 'whether candidates for election as judges of the [ECtHR] meet the criteria stipulated in Article 21 para 1'. This involves on its face looking simply at the question whether the candidates are 'of high moral character and possess the qualifications required for appointment to high judicial office or [are] jurists of recognised competence'. However, the Strasbourg panel's operating rules (set out in the same Resolution) go on to refer to its role as being to 'assess the suitability of candidates'. So the role of the two panels may well be identical, despite the different phraseology.

24. The operating rules of the Strasbourg panel do however differ from those of the article 255 panel in two important respects. First, the Strasbourg panel's procedure is basically written, with members transmitting their views to the chair in writing, and meetings only being held where deemed necessary. It may seek further information from nominating states, and in exceptional circumstances may when necessary have a meeting in camera with representatives of that state. The exclusion of provision for interviews or even, save exceptionally, meetings, seems to have arisen from financial considerations. The panel's proceedings are, like the EU panel's, confidential.

25. Second, the Strasbourg panel's advice on a list is given in the first instance only to the State putting forward that list. That State therefore appears at this stage to be free of the peer pressure from other States which might otherwise influence it to withdraw any candidate(s) in respect of whom the panel's advice was unfavourable. After the list has been further scrutinised by a Council of Europe Assembly's election sub-committee and the list is being considered by the full Assembly, Resolution CM/Res(2010)26 requires the panel's advice to be given to all Council of Europe States, but only on a confidential basis.

26. That brings me to a more fundamental difference between the current systems in relation to the Luxembourg and Strasbourg Courts. As noted above, EU appointments can only be made by the governments of Europe by unanimity. If the panel gives an unfavourable opinion on suitability, it may be unlikely that the governments of Europe would arrive at a contrary view. In Strasbourg, however, the matter goes from the panel to the Assembly's election committee, and then to the whole Assembly.

Political canvassing of or bargaining among members of the legal affairs committee and of members or groups members in the Assembly is by no means unknown. But, putting aside the improbable event of some clear and fundamental error or misapprehension on the part of the Strasbourg panel, one would have expected the panel's assessment of the legal merits and suitability of any candidate to prove the last word. The Strasbourg Court and its image in the eyes of the jurisdictions and public it serves are matters of great importance and sensitivity. Yet, according to a recent article in *Europäische Grundrechte* (6) the Assembly in June 2012 elected a judge in respect of whom the panel and election committee had both issued unfavourable assessments. This appears to have occurred without any debate in the Assembly, whether public or in camera, in which any reasons for over-ruling the views of the panel and sub-committee might have been aired(7). However, I note that, on later elections of different judges in early October 2012, the Council of Europe issued a press release which actually stated the election sub-committee's recommendations, as well as declassifying the details of the Assembly's voting (which on this occasion followed the sub-committee's recommendations). Whatever the background to this innovation, it must be seen as a positive step, and certainly shows how fast moving the area is.

Initiatives to expand the Article 255 panel's role

27. Recently, there have been initiatives that may expand the role of the Article 255 panel. To relieve the pressure on the over-worked General Court, the Court of Justice on 7 April 2011, issued its own proposal to the Commission for an enlargement of the General Court by at least 12 judges from its present size of 27 judges. The Court raised the possibility that the additional judges would enable the creation of specialised chambers within the General Court. The Council and Commission both reacted positively to the initiative. The Commission has taken up not only the idea of specialised chambers within the General Court itself, but also the important question how any new judges should be chosen. It proposed either an extension of the national principle, giving each state in turn a chance to appoint, or a modified system whereby six new judges would be chosen in that way, but the other six would be selected from among candidates to be put forward by states, upon an opinion received from the article 255 panel stating an order of merit for the candidates whose suitability is confirmed, having regard to the judicial qualifications required to sit in one of the specialised chambers to be established by the General Court. This would, self-evidently, represent an important increment in the role and work of the panel. However, I understand that it is not clear that the Council, in the present era of economic austerity, is keen on the resource implications, or that any steps will therefore be taken, at least in the short term, to pursue this proposal.

28. The Court raised the possibility that the additional judges would enable the creation of specialised chambers within the General Court. The Council and Commission both reacted positively to the initiative. The Commission has taken up not only the idea of specialised chambers within the General Court itself, but also the important question how any new judges should be chosen. It proposed either an extension of the national principle, giving each state in turn a chance to appoint, or a modified system whereby six new judges would be chosen in that way, but the other six would be selected from among candidates to be put forward by states, upon an opinion received from the article 255 panel stating an order of merit for the candidates whose suitability is confirmed, having regard to the judicial qualifications required to sit in one of the specialised chambers to be established by the General Court. This would, self-evidently, represent an important increment in the role and work of the panel. However, I understand that it is not clear that the Council, in the present era of economic austerity, is keen on the resource implications, or that any steps will therefore be taken, at least in the short term, to pursue this proposal.

A second initiative may follow from the need, if the EU adheres to the European Convention on Human Rights, for it to present a list of three persons, from which one would be chosen by the Council of Europe's Assembly as the EU judge on the European Court of Human Rights. It is possible that the Article 255

panel, or its members, might be given a role in this regard. But that too remains to be seen. It is certainly not part of the panel's role to seek any different or expanded mandate. We are kept quite busy as it is.

Conclusion

29. Sir David Edward, former UK judge on the former Court, once described the EU Court as the Cinderella of inter-governmental conferences, when it came to thinking how it should be structure and work(8). Whether or not anything comes of these particular initiatives, the development of the Article 255 panel and its Strasbourg sister must be seen as promising steps towards a recognition of the need to ensure and to demonstrate the quality of the judges who sit on the Luxembourg and Strasbourg Courts. It has been, rather faintly, suggested that the introduction of the panels might have a chilling effect on applications. I would be surprised if that were so, when the panel's reports to governments remain confidential. At a national level, at least in the UK, it is now axiomatic that the most senior practitioners apply and are interviewed for appointment or promotion; and there is no shortage of candidates.

30. Moreover, even if there is any chilling effect, it is certainly outweighed by the advantages of an objective assessment. That this should take place is ultimately in States' own interests. It is certainly in the interests of all who use and are affected by the jurisprudence of the Luxembourg and Strasbourg Courts. Public confidence in the workings of the Courts is critical to both the EU and the Convention systems. Nationally, it is also in all our interests to ensure that our national systems of selection and nomination are open, objective, fair and efficient.

*© Lord Mance

(1) See e.g. the Interrights Report of May 1993, Opinion N° 5 (2003) of the Consultative Council of European Judges on the law and practice of judicial appointments to the European court of human rights, the Burgh House Principles, issued by a study group of the International Law Association in 2004, and the paper given by Paul Mahoney (now Judge Mahoney in the European Court of Human Rights) at a Lancaster House conference in October 2008.

(2) We have taken the view that European Union law requires this: *Case C-28/08 Commission v Bavarian Lager Co Ltd*.

(3) The word 'high' is new, and an appropriate recognition of the importance of that Court.

(4) Resolution 1366 (2004), Recommendation 1649 (2004) and Resolutions 1426 (2005) and 1627 (2008), declare that that single-sex lists are not acceptable, where the opposite sex is under-represented (meaning made up less than 40% of the Court) or unless exceptional circumstances exist (as where, despite all necessary steps, an appropriate candidate of the relevant sex cannot be identified). Recommendation 1649 (2004) and Resolution 1426 (2005) also address national selection processes. The first invites open calls for candidates with human rights experience and sufficient knowledge of at least one of the two official languages through the specialised press, and in the second, the Assembly '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) Documents CM(2012)40 and addendum.

(6) Mehr Transparenz für die Wahrung professioneller Qualität bei den Richter-Wahlen zum EGMR EuGRZ 2012, 486, by Norbert Peter Engel.

(7)The internet at <http://assembly.coe.int/Documents/Records/2012/E/1206261000E.htm> shows that a UK member of the Assembly, Lord Tomlinson, tried to refer to the election sub-committee report showing who that committee had selected, but was ruled out of order by the Assembly's President on the ground that the document was confidential.

(8) Oral evidence given by Sir David Edward to the House of Lords European Union Select Committee reporting on the Lisbon Treaty: see The Treaty of Lisbon: an Impact Assessment 10th Report of Session 2007-2008 HL Paper 62-II, Volume II, S38 Q134.

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