

Newsletter n° 21-22/2012

Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights

Report on the Questionnaire regarding Appointment of Judges to the Supreme Court

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New Members and Observers

Editorial

President Geert J.M. Corstens

On 25 and 26 October 2012, our Network held its fifth Colloquium on ‘The Appointment of Judges to the Supreme Court, the European Court of Justice and the European Court of Human Rights’ in the Grand-Chambre of the Cour de cassation in Paris. We are most grateful to First President Vincent Lamanda for his first-rate organisation and outstanding hospitality. In this new Information Letter/Bulletin, you will find a short summary prepared by the General Rapporteurs on the appointment of judges in supreme courts.

We also held meetings of the Board and General Assembly, during which, after among other things the adoption of an amendment to the Articles of Association, it was decided to confer the title of Honorary President on Mr András Baka, former President of the Hungarian Supreme Court, and former President of the Network until 31 December 2011. We offer him our warmest congratulations.

After being opened by a reception hosted by First President Lamanda in the mediaeval rooms of the Conciergerie, at the Palais de Justice, our proceedings were brought to a close by a most cordial reception organised by Ms Christiane Taubira, Garde des Sceaux, Ministry of Justice.

Agenda of the Fifth Colloquium held in Paris on 26 October 2012

Grand-Chambre of the Cour de cassation ‘Appointment of Judges to the Supreme Court, to the Court of Justice of the European Union and to the European Court of Human Rights’

Session I: ‘Appointment of Judges to the Supreme Court?’

Moderator: Ms Susan Denham, Chief Justice of the Supreme Court of Ireland

Introductory Report (I): Prof. Dr. Klaus Tolksdorf, President of the *Bundesgerichtshof* (Germany)

Session II: ‘Appointment of Judges to the Supreme Court?’

Moderator: Mr Tore Schei, President of the Supreme Court of Norway

Introductory Report (II): Mr Geert J. M. Corstens, President of the *Hoge Raad* (Netherlands), President of the Network.

Session III:

?Appointment of Judges to the Court of Justice of the European Union and to the Court of Human Rights?

Moderator: Mr Branko Hrvatin, President of the Supreme Court of Croatia

Introductory Report: The Right Hon the Lord Mance, Justice of the Supreme Court of the United Kingdom

Prof. Dr. Klaus Tolksdorf, President of the Bundesgerichtshof (Germany)

Report on the Questionnaire regarding Appointment of Judges to the Supreme Court

1- Are open positions to Judgeships at the Supreme Court publicized?

2- Who can apply to judgeships at The Supreme Court (is there a ratio for candidates not already members of the judiciary)?

3- How is conducted the selection of the applicants to the Supreme Court positions: which body is practically in charge of drawing up the list of candidates? What are the criteria for nomination on the list of candidates (age, seniority, qualifications, etc)? Are those criteria publicized? Is there a hearing of the selected candidates? By whom?

4- Is the Supreme Court (through a specific body of the Supreme Court or in conjunction with other bodies?), and especially its President, involved in the selection process of the applicants? And in the appointment process of those who are selected (proposal, recommendation, requirement of approval, etc.)?

5- Which State bodies (other than Councils for the Judiciary and Supreme Courts) are involved in the selection and appointment process of Supreme Court judges?

Summary of the answers

1. Only in seven countries vacancies at the Supreme Courts are not publicly advertised.

In the other countries open positions are placed on official web sites either of the Supreme Court or the Ministry of Justice. Quite often, this is accompanied by an announcement in an official gazette and/or a central newspaper or journal. Candidates can decide to apply. Only a few reports indicate that an organ of the selecting process approaches possible candidates.

2. Generally speaking, in all countries, the criteria a candidate has to meet are written down by law. Some national rulings provide even a very detailed list of conditions whereas most countries only indicate some formal aspects.

Generally ? but there are exceptions - the applicants must have a law degree from a university and also must have passed a special professional law examination. Several countries state a minimum of age, which is between 30 and 45 years, others request a minimum of legal experience differing from 5 to 15 years. As to this, judges quite often need less time of experience than other candidates.

Almost all countries report that one does not necessarily have to be a member of the judiciary to become a judge of the Supreme Court. Judgeships are especially also open to professors from universities, in the majority of cases also to lawyers, prosecutors and members of the administrative service. Only three Supreme Courts report a ratio ? about

20% - for candidates who are not members of the judiciary.

3. There has been reported an enormous variety of selection and nomination procedures. Several entities with a variety of functions and different scopes of influence can be involved in the selection of the candidates.

Very often, a special election committee or the council of the judiciary draws up a list of candidates. In most countries, the proposal is binding, or ? if it is not formally binding ? it is at least expected to be followed. It is quite uncommon that the election committee or the judicial council is restricted to an advisory role.

The main criterion to be drawn up as candidate is qualification which is usually verified on the basis of references, in many countries followed by a hearing before the selection organ. In one country applicants even have to pass a special exam which consists of a written and an oral part.

Other common criteria to the selection process are seniority, publications and promotion level. Some countries also indicate the applicants' ethic, which may even be opinioned by a special ethic committee as an important criterion.

Only a few countries report the criteria of selection being published.

4. When it comes to the role of the Supreme Court or its President in the selection process there is also an enormous variety of answers. In some countries a panel of the Supreme Court, the Supreme Court in plenary session or the President of the Court have a say in the nomination of new judges. They are involved by drawing up a candidates' list, which may even be binding. However, there are also Supreme Courts whose opinion is only advisory to the entity, which is responsible for the decision.

In some countries, the President of the Supreme Court is member of the election committee or the Council of the Judiciary and hereby is involved in the selection process.

Countries where the Supreme Court or its President are not involved in the procedure of selecting a candidate at all are rare.

5. Finally, the President or members of Government like the minister of justice or the prime minister may have a decisive role during the appointment process, be it through an exclusive right to nominate candidates or through their final decision-making authority.

President Geert Corstens, Hoge Raad (Netherlands) Report on the Questionnaire regarding Appointment of Judges to the Supreme Court Questions 6-10

6. Is there transparency of the selection process (a.) number of applicants, (b.) selection criteria? And of the appointment process (c) publicity of the list candidates, (d), public hearing?

7. (a) Who reaches the decision to appoint among the selected candidates? (b) On which criteria (merit, representativeness of the society, professional experience, etc.)

8. Can the selection of an Applicant at the Supreme Court be appealed? By whom? To whom? And regarding the decision to appoint the selected candidate?

9. (a) Who carries out the appointment (Head of State?)? (b) May the appointing authority refuse to appoint?

10. Are you satisfied of the prevailing conditions in your country? Which modifications would you suggest?

Summary of the Answers

6.(a). In a small majority of the countries the number (and names) of applicants are not made public.

Whether or not the number of applicants and their names are made public depends, among other things, on whether the candidates themselves have to take the initiative to apply or the selecting organ will take the initiative to approach possible candidates. In countries where the selecting organ takes the initiative, there are no applicants in the sense that the initiative to apply comes solely from the candidates themselves. In countries where the initiative rests with the candidates themselves a consideration not to publicize, the number and names of applicants might be to protect applicants from public disgrace of applying but not being nominated, and to prevent the chilling effect this might have.

(b). In most, if not all, countries certain conditions a candidate must fulfill to be eligible are laid down in legislation. In most countries these legal conditions/criteria are quite formal and of a minimal nature (age, nationality, degree in law). In some other countries, these conditions are more detailed. In countries where the criteria laid down in legislation are formal and basic, a set of more detailed criteria is used in the selection process. In roughly two thirds of the countries, all the relevant criteria are publicized.

(c). In a small majority of the countries, the list of candidates that will go further in the nomination- and appointment-process is made public. Most countries that do not publicize the number of applicants and their names do also preserve confidentiality with regard to the candidates that are in the nomination- and appointment-process.

(d). In an overwhelming majority of the countries, no public hearings are held. One of the exceptions in this regard is Portugal, where recent changes in the procedure provide for a public hearing by a jury, but ? judging by the Portuguese reply to the questionnaire ? this does not seem to be seen as an improvement, since it does not achieve the goal which was aimed at by adding this new element to the procedure. An interesting alternative might be seen in the Romanian procedure, where the interviews that are held with the candidates are published on the website of the Conseil Supérieur de la Magistrature.

7. On the question who reaches the decision to appoint among the selected candidates the answers vary to a large extent. Some countries use a procedure in which the judiciary explicitly plays a crucial role, while other countries rely more heavily on bodies dominated by other branches of government (parliament, president). In several countries, the balance of powers between the branches of government involved in the process of selecting and appointing judges to the supreme court seems to be struck by leaving the selection to a body dominated by the judiciary, while leaving the appointment of the selected candidates to a representative of the executive branch of government.

In most countries the criteria that are used for selecting candidates are no other criteria than the ones that are being used for nominating and appointing candidates.

8. In most countries the selection of an applicant cannot be appealed. In countries where such a possibility does exist, it seems to be a theoretical possibility that is not used in practice.

9. In most countries, a high official on the side of the government (president, minister) carries out the appointment (though in some countries formally the Queen does). In several countries parliament carries out the appointment. In both these countries, the high official or parliament can refuse to carry out the appointment. Though in practice in most countries this does not or most seldom occur.

In some other countries, a high judicial organ carries out the appointment. Because in these countries this organ is also in charge of the selection-process, there is no need for a possibility to refuse to carry out the appointment.

10. In most countries, the process of selection and appointment of candidates is satisfactory to the respondents. The remarks that were made about possible improvements concentrate on two subjects: (i) the level of transparency of the

procedure from the perspective of the general public (?could be better?, but might not lead to ?les buts envisagés?) and (ii) the influence of the executive and legislative branches government (?should be less?, but ?might diminish legitimacy?).

New Members and Observers

Austria: Hon.-Prof. Dr. Eckart Ratz had been appointed President of the Supreme Court of Austria on 1 January 2012 succeeding Ms Irmgard Griss, former President of the Network, who had retired.

Belgium: by Decree of 24 April 2012, the King had appointed Mr Etienne Goethals to the office of First President of the Belgian *Cour de cassation* succeeding Mr Ghislain Londers.

Luxembourg: Mr Georges Santer had been appointed President of the Superior Court of Justice of the Grand-Duchy of Luxembourg, with effect from 1 May 2012, succeeding Ms Marie-Paule Engel.

Spain: Mr Gonzalo Moliner had been elected President of the Supreme Court of Spain on 17 July 2012 succeeding Mr Carlos Divar.

United Kingdom: Lord Neuberger of Abbotsbury had been appointed President of the Supreme Court of the United Kingdom with effect from 1 October 2012 succeeding Lord Phillips of Worth Matravers who had retired.

Montenegro: Following a decision of the General Assembly in Sofia in October 2011, Ms Vesna Medenica

Attached file:

[Newsletter n° 21-22/2012.pdf](#)^[1]

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