EQUALITY AND DISCRIMINATION - TEMPORARY SPECIAL MEASURES (AFFIRMATIVE ACTION)

IV. JURISPRUDENCE

ICCPR

- *Guido Jacobs v. Belgium* (943/2000), ICCPR, A/59/40 vol. II (7 July 2004) 138 at paras. 2.1-2.10, 9.2-9.6, 9.8, 9.9, 9.11 and Individual Opinion of Ruth Wedgwood (concurring), at 158.

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2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice1/ shall comprise 44 members of Belgian nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

> "The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:
>
> 1. Four lawyers with at least 10 years' professional experience at the bar;
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> 2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years' professional experience relevant to the High Council's work;
>
> 3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years' professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council's work [...]."

2.4 Article 259 bis-2, paragraph 2, also stipulates:

> "Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed."

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2.5 Lastly, in accordance with paragraph 4 of the same article, "a list of alternate members of the High Council shall be drawn up for the duration of the term [...]. For non-justices this list shall be drawn up by the Senate [...] and shall comprise the candidates who are not appointed".

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State, submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

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9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25 (c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. States parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men 8/. The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question

in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies 9/. The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there 10/. On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men

and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

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9.8 With regard to the complaint of discrimination between categories within the group of non-justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college - which the author concedes - whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

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9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

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Notes

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1/ Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

> "One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High Council of Justice shall respect the independence referred to in paragraph 1. It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by

their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law."

"Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph […]."

Paragraph 3:

"The High Council of Justice shall exercise its authority in the following areas:

1. Presentation of candidates for appointment as judges […] or members of the prosecutor's office;
2. Presentation of candidates for designation to the duties […] of *chef de corps* in the public prosecutor's office;
3. Access to the position of judge or member of the public prosecutor's office;
4. Training of judges and members of the public prosecutor's office;
5. Establishment of general profiles for the designations referred to in 2;
6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;
7. General supervision and promotion of the use of internal monitoring methods;
8. To the exclusion of all disciplinary and criminal tribunals:
   - Acceptance and follow-up of complaints concerning the operation of the judicial branch;
   - Initiation of inquiries into the operation of the judicial branch [...]."

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8/ General comment No. 28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

9/ "Since the High Council also serves as an advisory body, each college shall comprise eight members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives. See also para. 6.3 of the present communication.

10/ "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p.1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 percent." Introduction to the Bill by the Secretary of State for Social Emancipation, p.1, 3 July 1990, Belgian Senate.

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Individual Opinion of Ruth Wedgwood (concurring)

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are directly elected by sitting judges and prosecutors. The other "non-justice" members are chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with "no fewer than four members of each sex" included among the 11 members of these "non-justice" groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this "advisory" body. It is important to note that the constitution or laws of some States parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.