
More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez

Françoise Tulkens*

Abstract

Having spent almost 14 years as a judge at the European Court of Human Rights, the author responds to and shares the critical view expressed by Hennette Vauchez in her article on the presence of women judges at the European Court of Human Rights. Some steps forward have admittedly been made through the voluntary action of the Council of Europe Parliamentary Assembly, but there has also been resistance in the implementation of these new rules. The gains are fragile and there are risks of regression. This situation confirms Kenney's analysis: women's progress is not natural, inevitable nor irreversible. A reaction is all the more necessary and urgent since, in the coming months of 2015 and subsequently, many elections of judges to the Court will take place, due in particular to the non-renewable nine-year term of office of judges introduced by Protocol No. 14 to the European Convention on Human Rights.

I am delighted to reply to the excellent article by Professor Stéphanie Hennette Vauchez on the rules and politics of gender balance at the European Court of Human Rights.¹ It is one of the first scholarly analyses dedicated entirely to this subject. Hennette Vauchez's study covers the lifetime of the Court from 1959 to 2012, and is based on solid sources, including empirical data and, in particular, an exhaustive comparative survey of the curriculum vitae of the 120 women presented as candidates for the post of judge during that period. My only slight note of caution (*petit bémol*) in relation to the scope and significance of this material is that, since the 1990s, the Council of Europe Parliamentary Assembly has required candidates to the Court to submit standardized CVs and, therefore, these CVs can really no longer be described as self-introduction texts. On the merits, what is the author's conclusion concerning the presence of women at the European Court of Human Rights? The picture is mixed (*en*

* Former Judge and Vice-President of the European Court of Human Rights. Email: francoise.tulkens@uclouvain.be.

¹ Hennette Vauchez, 'More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights', this issue at 195.

demi-teinte): there has been some progress, admittedly, but also resistance, even unexplained, or rather inexplicable, regression. I fully share this view, unfortunately. I shall here respond completely freely, in a committed and subjective manner, highlighting certain points addressed in Stéphanie Henneke Vauchez's article that I believe are important.

To begin with, the question of the legitimacy of international courts is obviously an important one and it is becoming increasingly so today. Yet, we should be careful not to miss the point here. The presence of women on the bench cannot be considered in itself a condition for the legitimacy of international courts.² Women are not on the bench to 'legitimate' or 'justify' anything. Women are present at the European Court of Human Rights simply because there is no reason for them not to be there.³ Conversely, I believe that it is the lack of women at the Court that poses a problem in terms of legitimacy.

As regards the European Court of Human Rights, in particular, there has been full agreement for some years now at all levels (the Council of Europe Committee of Ministers, the Council of Europe Parliamentary Assembly, and the Court itself), that the selection of judges is essential, crucial, fundamental, and so on. A great illusion or a pure myth of Sisyphus? Numerous initiatives have been introduced – and I am sure that still others will emerge – to seek to improve the selection procedure. The most recent initiative is the Advisory Panel of Experts established by Resolution CM/Res(2010)26 of the Council of Europe Committee of Ministers.⁴ This body is meant to act as a filter between the national selection procedures and the Council of Europe appointments. An excellent initiative, certainly, but the results of its work, intended for the Council of Europe Committee of Ministers and the Member States only, remain confidential. Moreover, being a purely advisory body, its powers are limited. However, it is very interesting to note that the Advisory Panel of Experts, in its Final Activity Report of December 2013, recalls that '[t]he aim of achieving a certain balance between the sexes has been discussed at length in recent years'. Therefore, '[t]he Panel has taken into account these new rules with respect to gender balance when it had to advise on an all-male list'.⁵ Finally, and more fundamentally, it seems that there is a kind of gap, with regard to the issue of the selection of judges, between the principles (announced) and the practices (followed). The exceptions are sometimes more extensive than the rules.

I agree with Henneke Vauchez's lucid observation that 'the notable evolution that has led from no women judges well into the Court's history to currently just about 40

² Cf. Tulkens, 'Parity on the Bench. Why? Why not?', 6 *European Human Rights Law Review* (2014) 587.

³ See Fura, 'The "Feminization" of the Court', in *The Conscience of Europe: 50 Years of the European Court of Human Rights* (2011) 186.

⁴ Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, adopted by the Council of Europe Committee of Ministers on 10 November 2010 at the 1097bis meeting of the Ministers' Deputies.

⁵ See Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, *Final Activity Report for the Attention of the Committee of Ministers*, Advisory Panel(2013)12EN, 11 December 2013, para. 36, available at www.coe.int/en/web/dlapil/advisory-panel (last visited 10 February 2015).

per cent of women judges' was by no means a 'natural evolution'.⁶ As Sally Kenney puts it, '[c]ontrary to popular belief, women's progress is not natural, inevitable' and, she rightly adds, '[not] irreversible'.⁷ The situation of women judges at the European Court of Human Rights is a perfect example of that. The gains made (*les acquis*) are always fragile and there are many risks of regression.

The actions of the Council of Europe Parliamentary Assembly have taken place over the long term. It is uncontested – and even undisputed – that Resolution 1366 (2004) of the Parliamentary Assembly, according to which the Assembly would no longer 'consider lists of candidates where ... the list does not include at least one candidate of each sex'⁸, constituted real progress, a genuine step forward, symbolically at least. Admittedly, it was only a weak form of affirmative action and a minimal obligation of means but not of result. Nevertheless, one might have hoped that this resolution would create a positive dynamic, pave a new way forward, if states had taken it seriously, which has not always been the case. As a matter of fact, the rot set in through the dubious logic of 'exceptional circumstances' left entirely to the discretion of Member States, on which was grafted the criterion regarding the threshold of 40 per cent for the sex which is under-represented among the sitting judges introduced by Resolution 1426 (2005).⁹ Rather than giving full force and effect to the 2004 resolution, as the European Court of Human Rights never tires of repeating in relation to the rights of the European Convention on Human Rights, the states – or at least some of them – have been active in progressively and methodically narrowing the resolution's scope and emptying it of substance; some have even fought against it frontally. I agree with Professor Henneke Vauchez: it is a defeat of a decade-long endeavour by the Parliamentary Assembly,¹⁰ the effects of which were inevitably felt in the subsequent elections. A reaction is all the more necessary and urgent since, in the coming months of 2015 and subsequently, many elections of judges to the Court will take place, due in particular to the non-renewable nine-year term of office of judges introduced by Protocol No. 14 to the European Convention on Human Rights, which entered into force in June 2010.¹¹

Among the reasons advanced by certain 'rebel' states for the need for 'exceptional circumstances' is one that produces a smile but which is clearly in bad faith: 'a State may face a situation where there is not one single woman at least as qualified

⁶ Henneke Vauchez, *supra* note 1, at 200–201 (emphasis added).

⁷ S.J. Kenney, *Gender & Justice: Why Women in the Judiciary Really Matter* (2013).

⁸ Resolution 1366 (2004) on *Candidates for the European Court of Human Rights*, adopted by the Council of Europe Parliamentary Assembly on 30 January 2004, para. 3.ii; see also Recommendation 1649 (2004) on *Candidates for the European Court of Human Rights*, adopted by the Parliamentary Assembly on the same day.

⁹ Resolution 1426 (2005) on *Candidates for the European Court of Human Rights*, adopted by the Standing Committee of the Council of Europe Parliamentary Assembly, acting on behalf of the Assembly, on 18 March 2005, para. 5.

¹⁰ Henneke Vauchez, *supra* note 1, at 208.

¹¹ See Council of European Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Procedure for Electing Judges to the European Court of Human Rights*, Information document prepared by the Secretariat, Doc. AS/Jur/Inf (2014) 03 rev. 5, 26 September 2014, at 4 and 6.

as a man'.¹² As Professor Hennette Vauchez rightly points out, this argument is all the more unsustainable given that there is no nationality requirement for nomination to the position of judge at the European Court of Human Rights.¹³ Indeed, it is not uncommon, even in the 'new' Court instituted by Protocol No. 11 and which started functioning on 1 November 1998, to see non-national judges sit on the Court (so, for instance, the Italian Judge Luigi Ferrari Bravo was elected in respect of San Marino and the Swiss Judges Lucius Caflisch and Mark Villiger were elected in respect of Liechtenstein). In fact, behind that argument of competence and qualifications, an apparently neutral and worn out argument, lies merely the expression of an entrenched discrimination.

The example of Belgium is not only problematic in itself, but was surrounded by untruths and was clearly insulting to Professor Eva Brems of Ghent University.¹⁴ In order to justify their all-male list, the Belgian authorities argued that the only woman who had applied in response to the national call for applications was 'underqualified' – an untenable statement, as Professor Brems' curriculum vitae clearly demonstrates. In reality, the Government was perhaps concerned about her overly high-calibre skills and probably no longer wanted to have a full-time professor as a judge; or maybe it considered that there had already been a female judge in respect of Belgium for a very long time. Here also Kenney's 'token woman' analysis is illuminating. The idea of the token 'is that only one spot exists for a marginalized category ... The assumption is that men are the natural occupants of such positions ... and that enough women have been appointed'.¹⁵ As for the argument based on the famous 40 per cent threshold, which would have been met in 2012, it could not be more fragile. Indeed, following the appointment of a male judge, this threshold was no longer reached at the end of 2012. Moreover, at the end of 2014 and in early 2015, many women judges left or will leave the Court, some for personal reasons, before the end of their terms, a rather odd situation which calls for analysis.

The reform of the Court has been on the agenda since the early 2000s and new additional protocols to the European Convention on Human Rights have in the meantime been adopted (Protocol No. 14 in 2010) or opened for signature (Protocols Nos. 15 and 16).¹⁶ Why was the option of including the gender criterion for the composition of the Court, which had been envisaged, ultimately rejected by the states, the 'Masters of the Treaty'? There is no real explanation for this missed opportunity, or

¹² Hennette Vauchez, *supra* note 1, at 206.

¹³ *Ibid.*, at 206, note 60.

¹⁴ See Remiche, 'Election of the New Belgian Judge to the ECHR. An All-male Short List Demonstrates Questionable Commitment to Gender Equality', *Oxford Human Rights Hub Blog*, 12 August 2012, available at <http://ohrh.law.ox.ac.uk> (last visited 10 February 2015); Burgorgue-Larsen, 'Des idéaux à la réalité. Réflexions comparées sur les processus de sélection et de nomination des membres des Cours européenne et interaméricaine des droits de l'homme', *La Revue des droits de l'homme*, 6 (2014), at 5, available at <http://revdh.revues.org/949> (last visited 8 March 2015).

¹⁵ S.J. Kenney, 'Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go', *Michigan State Law Review* (2012) 1499, at 1508–1509.

¹⁶ Tulkens, 'La Cour européenne des droits de l'homme et la Déclaration de Brighton. Oublier la réforme et penser l'avenir', 48 *Cahiers de droit européen* (2012) 305.

perhaps there is one explanation, albeit too simplistic, too well known: Is this kind of provision really necessary? We see here a vivid illustration of Hilary Charlesworth and Christine Chinkin's analysis. In the field of international law, the states are the bastions that pose most resistance to various forms in which the concept of gender can be taken into account.¹⁷

Lastly, one issue raised in Professor Henneke Vauchez's article, sounding a bit like an *obiter dictum*, would necessitate further examination: 'there are traces in both the institutional politics of international law and the literature of many stereotypes that associate women with human rights'.¹⁸ Professor Eva Brems, who was considered to be 'underqualified' but who has written outstanding pages on the rights of the European Convention on Human Rights¹⁹ and on feminism and human rights²⁰, could enlighten us on that issue.

More women at the Court? Yes, please. Women judges as *des hommes comme les autres*? No, thank you.

¹⁷ H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

¹⁸ Henneke Vauchez, *supra* note 1, at 212.

¹⁹ See, among others: Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) 240; *Id.*, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', 27 *Human Rights Quarterly (HRQ)* (2005) 294; *Id.*, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration in the Case-law of the European Court of Human Rights', in M.-C. Foblets *et al.* (eds.), *Cultural Diversity and the Law: State Responses from Around the World* (2010) 663; *Id.* (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (2013); E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014).

²⁰ Brems, 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights Discourse', 19 *HRQ* (1997) 136; *Id.*, *Human Rights: Universality and Diversity* (2001); *Id.*, 'Protecting the Human Rights of Women', in G.M. Lyons and J. Mayall (eds), *International Human Rights in the 21st Century* (2003) 100.