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DISCUSSION RESPONSE

Judicial appointments and the right kind of politics

MARIJN VAN DER SLUIS — 21 July, 2014



A response to Bilyana Petkova

Judicial appointments matter, but it is difficult to pinpoint why exactly. One possibility – mentioned by Bilyana – is that there is a connection between representation and legitimacy. It is easy to see that there is a link. Large groups in society might lose trust in the legal system if they are systematically underrepresented on the bench. However, the link is nebulous and never to be discussed directly. Usually, we dare not say that a single court ruling is illegitimate because of a problem of representation. The law applies equally to all and we expect judges to have empathy, so that they can communicate effectively with a wide variety of people.

Bilyana also points to another vital issue in judicial appointments: quality. We want good judges. Contrary to

representation, judicial quality directly affects the legitimacy of individual decisions. If judges are not independent, if they are biased or if they lack basic legal skills, their decisions are not worth the paper they are written on. The creation of the article 255 TFEU Panel serves the purpose of safeguarding basic judicial quality. As national selection procedures might fall pray to political party infighting or bureaucratic malpractice, judicial quality might not get the attention it deserves. We may quarrel over the exact criteria set by the Panel (20 years experience is truly ridiculous), but it is good that the Panel eliminates the wrong kind of politics from the appointment-process.

However, and this is a topic not touched upon by Bilyana, we may ask whether the panel will not also exclude the right kind of politics: appointments based on political philosophy. This is one element of representation that rarely gets attention for the CJEU. If we believe that representation is an important factor in the legitimacy of the Court, which groups should the judges represent? Should we look at gender, religion, social class, education, age or indeed political beliefs? It is difficult to make a principled argument why one of these should take precedence over the other; it is a product of the times we live in which claims of representation are considered valid. The rise of anti-Europeanism therefore begs the question whether the political philosophy of future judges should also be taken into account when assessing the representational qualities of the Court. And furthermore, it should be asked whether the Panel might be biased towards certain claims of representation.

Two important questions therefore remain: 1) Should political ideology be a factor in the selection and

appointment of European judges? (And if so, should it be a factor of less, more or equal weight as gender?) 2) Would the Panel affect the representational qualities of the CJEU in the short or longer term?

Marijn van der Sluis is PhD candidate at the European University Institute in Florence.

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