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Consider the case of *Jacobs v. Belgium* (/c4x/LouvainX/Louv2.01x/asset/_Materials__Discrimination_-_Jacobs_Final_.pdf) on which the Human Rights Committee expressed its views in a decision adopted on 7 July 2004. Once you have read the case, try to answer the following questions and then turn to the explanations:

JACOBS VS. BELGIUM - EXERCISE 1 (1/1 point)

1. The Human Rights Committee rejects the allegation of the author of the communication that the system introduced in Belgium for a balanced representation of both sexes is discriminatory. But was Belgium not only allowed to introduce such a system, but *obliged* to do so under international human rights law?

- ☐ Yes, the Human Rights Committee implies that Belgium was duty-bound to improve the position of the under-represented sex in a body such as the High Council of Justice;
- ☐ No. Although States are free to do so if they so wish, there is no duty under international human rights law to adopt temporary special measures for the benefit of the members of a disadvantaged or under-represented group; or,
- ☒ No. States are not *obliged* to take positive action measures. However, they are *strongly encouraged* under international human rights law to adopt temporary special measures for the benefit of the members of a disadvantaged or under-represented group, and therefore the Human Rights Committee's decision seeks to give them the necessary policy space to do so ✓

EXPLANATION


The third option probably provides the most accurate restatement of the position of the Human Rights Committee. Do not worry, however, if you chose the first option. Although this is not cited by the Human Rights Committee, the conclusion which it arrives at in the case of *Jacobs* will likely have been influenced by the position of the Committee on the Elimination of Discrimination against Women, which, in its 1997 General recommendation No. 23: *Political and public life*, recommends to the States parties 'the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body'. Any other conclusion by the Human Rights Committee in *Jacobs* would have potentially placed Belgium before two conflicting requirements, at least if we consider the general recommendations adopted by the CEDAW Committee as authoritative for the States parties to the *Convention on the Elimination of All Forms of Discrimination against Women*.

may be not only acceptable, but even obligatory, is shared by the Human Rights Committee, under the International Covenant on Civil and Political Rights (General Comment No. 18: *Non-discrimination* (1989), para. 10), and by the Committee on Economic, Social and Cultural Rights, under the International Covenant on Economic, Social and Cultural Rights (General Comment No. 20: *Non-discrimination in the enjoyment of economic, social and cultural rights* (2009), para. 9). The Committee on Economic, Social and Cultural Rights took the view already in its first General Comment that 'special attention (should) be given to any worse off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged' (General comment No. 1: *Reporting by States parties* (1989), para. 3). In its General Comment No. 5: *The rights of persons with disabilities*, adopted in 1994, the Committee noted that 'appropriate measures (may) need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities', and considered that 'such actions should not be considered discriminatory in the sense of Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective' (para. 18).

[Check](#)[Hide Answer](#)

JACOBS VS. BELGIUM - EXERCISE 2 (1/1 point)

2. The Human Rights Committee sees the introduction by Belgium of a system for a balanced representation of both sexes in the High Council of Justice as allowable because it does not lead to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. This illustrates that, according to the Human Rights Committee:

- ☐ The adoption of 'temporary special measures' is a derogation from the principle of formal equality (non-discrimination on grounds of sex) and therefore should be allowed only under strict conditions;
- ☐ The system introduced by Belgium aimed at a balanced representation of both sexes, and was therefore in favor neither of women nor of men exclusively; therefore a strict scrutiny was required, to avoid any risk of discrimination; or,
- ☒ Both of the above. 

EXPLANATION

The third option is probably the one that best reflects the position of the Human Rights Committee in this case, but don't worry too much if you chose for the other options: both are plausible, although they do point at different rationales for the adoption of the Committee's decision.

It is an important question whether positive action should be treated as implementing the principle of equality of treatment, and therefore as to be authorized under very flexible conditions, or instead whether it should be seen instead as an exception to the principle of (formal) equality of treatment, to be authorized only under strictly defined conditions. The Committee on the Elimination of Discrimination against Women, in its General recommendation No. 5: *Temporary special measures*, adopted in 1988, notes that 'the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality. ... The Committee views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or


substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms. While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States parties under the Convention to improve the position of women to one of de facto or substantive equality with men exists irrespective of any proof of past discrimination.' (paras. 14 and 18).

However, this position should not lead to allow the adoption of measures that go so far as to become a misuse of the tool and lead to what has sometimes been denounced as "reverse discrimination".

[Check](#)[Hide Answer](#)

JACOBS VS. BELGIUM - EXERCISE 3 (1/1 point)

3. You may have noted that, in response to one of the arguments of the Mr Jacobs, the Human Rights Committee remarks that 'the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience'. How should this be interpreted?

- ☐ The Human Rights Committee is unwilling to allow for measures to improve the gender balance that would derogate from the principle of 'meritocracy': only the 'best' candidates, as assessed from their qualifications and experience, should be chosen;
- ☒ The Human Rights Committee suggests that if a system to ensure a gender balance were to lead to appoint candidates that are not sufficiently qualified, this might be disproportionate; or, 
- ☐ Both of the above.

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EXPLANATION

The second option probably reflects best the approach of the Human Rights Committee. That is not to say that this approach is always justifiable. In particular, a selection criterion based on the number of years of professional experience may in fact negatively impact women, since they, more frequently than men, may have to interrupt their careers in order to raise children, particularly in countries where childcare services are insufficient or very expensive. More generally, one should keep in mind that the notion of 'merit' is often biased in favor of certain qualities that represent the 'norm', and which disadvantaged groups may find it more difficult to acquire. In a case concerning the earmarking by the University of Oslo of certain research grants for women, in order to improve their academic representation, the European Free Trade Agreement Court (which applies European Union, in a number of areas, to EFTA countries, including Norway) remarked:

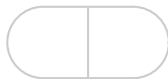
'in assessing the qualifications of candidates, certain positive and negative criteria could be used, which, while formulated in gender neutral terms, (may be) intended to reduce gender inequalities that occur in practice in social life. Among such criteria (are) capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications include (...) parttime work, leaves and delays as a result of family work. Family status and partner's income should be viewed as immaterial and seniority, age and date of last promotion should not be given undue weight.' (European Free Trade Association (EFTA) Court, Case E-1/02, *EFTA Surveillance Authority v. Kingdom of Norway*, judgment of 24 January 2003, para. 39).

This is a useful reminder that we should be careful not to fetishize 'merit', and instead constantly re-examine how we defined that concept (or its equivalents such as 'qualifications' or 'competence') in order to ensure that these criteria

The Jacobs vs. Belgium case | [6.4] What is di... <https://courses.edx.org/courses/LouvainX/Lo...>
do not lead to the exclusion of disadvantaged groups, who historically may not have been in a position to shape what we mean by such criteria.

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