



Doc. 11243  
16 April 2007

## Candidates for the European Court of Human Rights

Opinion<sup>1</sup>

Committee on Equal Opportunities for Women and Men

Rapporteur: Mr José MENDES BOTA, Portugal, Group of the European People's Party

### I. Conclusions of the Committee

The Committee on Equal Opportunities for Women and Men fundamentally opposes the draft resolution presented. It recommends the rejection of the draft resolution by the Assembly (i.e. a “no” vote in the final vote on the draft resolution in the Assembly).

### II. Explanatory memorandum by the Rapporteur, Mr Mendes Bota

#### A. *The composition of the Court and of candidate lists*

1. In its Resolution 1366 (2004) on *Candidates for the European Court of Human Rights*, adopted during the January 2004 part-session, the Assembly decided that it would no longer consider lists of candidates for the European Court of Human Rights which did not include at least one candidate of each sex. This rule was changed a year later through Resolution 1426 (2005) to allow for uni-sex candidate lists, provided they were from the underrepresented sex on the Court, i.e. currently women.

2. The *status quo* thus is currently that every country drawing up a list of three candidates for the post of judge on the European Court of Human Rights must include at least one woman on its list – so that the Assembly has at least a chance to elect a female judge, with a view to improving the gender balance on the Court. In terms of procedure, the Assembly cannot consider lists which do not satisfy this criterion.

3. When this measure was decided upon more than three years ago, there were 11 female judges to 32 male judges, i.e. women made up only about a quarter of the Court's composition (26%). The situation has improved slightly today: there are 14 female judges to 32 male judges, i.e. women make up 30% of the Court's composition.

4. The biggest change has been in the composition of candidate lists. From the creation of the new Court of Human Rights in 1998 until January 2004, when Resolution 1366 (2004) was adopted, 68 elections of judges took place. 40 of the 68 High Contracting Parties in question submitted candidate lists composed exclusively of men (59%), three submitted lists composed entirely of women (4%), 21 lists included one woman and two men (31%) and four lists included two women and one man (6%). As the then Rapporteur, Mrs Cliveti, pointed out in her opinion in January 2004 (Doc. 10048): “In other words, 61 out of 68 lists had a majority of male candidates on their lists – nearly

---

<sup>1</sup> See Doc. 11208 tabled by the Committee on Legal Affairs and Human Rights.

90%. [...], in nearly three-fifth of the elections for judges, the Parliamentary Assembly did not even have the choice of electing a female judge, as only all-male candidate lists were proposed.”<sup>2</sup>

5. From January 2004 until January 2007, with the new rules in effect, 27 elections took place. Four more lists were submitted, but not considered by the Assembly – in the case of one country, the Assembly considered that there was only one valid candidate, so the list was sent back; in the case of another country, an all-male list was submitted which was also sent back; the last country submitted an all-male candidate list twice (in 2004 and in 2006) – the first list was sent back, and the second list was declared incompatible with the Assembly’s resolutions.

6. Of the 31 lists submitted, there were thus three all-male candidate lists (nearly 10%), one all-female candidate list (3%), one list composed of one man and two women (3%), and 26 lists composed of two men and one woman (84%). In eight cases (30%), the Assembly elected a female judge, in nineteen cases (70%), a male judge.

7. In other words, the adoption of Resolutions Nos. 1366 and 1426 has led to a slight increase in the number of female judges elected to the European Court of Human Rights, and to a radical change in the composition of candidate lists submitted by the High Contracting Parties: before January 2004, the vast majority of all lists submitted were all-male (59%) – since April 2004 an even bigger majority of candidate lists submitted was composed of two men and one woman (84%). In practice, this means that, before January 2004, in the majority of cases the Assembly had no choice but to elect a male judge. Since April 2004, the Assembly has been theoretically able to choose a woman each time (even if it did not do so in practice).

## **B. The qualifications of candidates**

8. The Committee on Legal Affairs and Human Rights is proposing to the Assembly to amend the rules introduced by the above-mentioned Resolutions, to allow the Assembly not to reject all-male lists in “exceptional circumstances” so as not to “reduce the Assembly’s ability to choose between three candidates who satisfy all the other selection criteria” (summary of Doc. 11208). Indeed, the Committee even considers that “Difficulties have, however, been encountered because of the strict application of the criterion set out in paragraph 3 ii. of Resolution 1366 (2004) as amended by Resolution 1426 (2005), to the detriment of the other criteria required in terms of the qualifications of the candidates.” (emphasis added)<sup>3</sup>. This is nothing more than an assumption that damages the credibility of female candidates and female judges on the European Court of Human Rights.

9. In fact, there is only one single country which has found it “difficult” to comply with the rule of the Assembly that a female candidate must be included on the candidate list. The judge for this country – Malta – was elected in January 1998 and took up his functions in November 1998 for a six-year term. The country twice put forward an all-male candidate list to replace him (transmitted to the Assembly by the Committee of Ministers in March 2004 and in September 2006), but the elections have not been held as the lists do not comply with the Assembly’s rules. The proposal of the Committee on Legal Affairs and Human Rights is, in fact, a proposal designed to change the Assembly’s rules to suit one single country, rather than make that one single country abide by the Assembly’s rules which it has already flouted twice!

10. The argument put forward by the Rapporteur of the Committee on Legal Affairs and Human Rights, Ms Bemelmans-Videc, to justify this proposal is that there may be exceptional circumstances where “a state has done everything possible to include members of the under-represented sex in the list of candidates – but without success because of the requirement to satisfy the other criteria concerning the choice of the best qualified candidates”.<sup>4</sup> This argument is untenable, as it presupposes that a state may face a situation where there is not one single woman at least as qualified as a man – which is simply inconceivable.

---

<sup>2</sup> See Appendix I for a table illustrating the situation.

<sup>3</sup> Paragraph 2 of the draft resolution proposed by the Committee on Legal Affairs and Human Rights.

<sup>4</sup> Paragraph 14 of the explanatory memorandum drawn up by the Rapporteur.

11. Why is this inconceivable? Few people know that there is no citizenship requirement to become a judge on the European Court of Human Rights. In other words, you do not need to hold the citizenship of the country proposing you – indeed, you do not even have to hold the citizenship of a High Contracting Party (i.e. a European citizenship). Thus, for example, a Swiss judge is currently serving on behalf of Liechtenstein, and, in the past, there has even been a Canadian judge on the Court. The necessary requirements to become a judge are, according to the Convention: “The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence”<sup>5</sup>. The Assembly itself has interpreted these requirements further in Resolution 1366 (2004).

12. Malta is not the smallest member state of the Council of Europe by any means. It has nearly 400.000 inhabitants, half of them women. There are two female judges and six female magistrates in Malta<sup>6</sup>, and many more female advocates<sup>7</sup> (the current judge on the Court, Mr Giovanni Bonello, was an advocate in private practice before he was elected). The country thus has a sufficiently large pool of highly qualified female potential candidates. However, even if it had not, it could choose a well-qualified female candidate from another country (the United Kingdom and Italy would spring to mind, the two countries which most influenced Malta’s legal tradition over the centuries). In fact, Malta could even choose amongst the most famous human rights lawyers globally, from Mary Robinson over Asma Jahangir to Shirin Ebadi. These candidates would certainly not be less qualified than the three male candidates Malta has proposed so far.

13. Furthermore, much smaller countries than Malta have included qualified women candidates on their candidate lists. In fact, in several cases, these candidates were even elected judges to the European Court for Human Rights, such as Mrs Isabelle Berro-Lefèvre for Monaco (population: around 32.000) and Mrs Antonella Mularoni for San Marino (population: around 30.000). The true impediment to the inclusion of a qualified woman candidate on the list submitted by Malta thus appears not to be a lack of qualified female candidates, but a lack of respect for the principle of gender equality.

### **C. The need for gender balance on the Court and in selection procedures**

14. Being elected a member of the European Court of Human Rights is an honour, which brings with it heavy responsibilities, but also high public esteem; it is seen as the pinnacle of a legal career. It is obvious that the position of judge at the European Court of Human Rights should thus be open equally to women and men.

15. However, in most countries, the selection procedure of the candidates at the national level is not fully transparent and dominated by men. With the “old boys network” alive and kicking in most member states, it should thus come as no surprise that, already at that level, more male than female candidates are put forward – in the last three years, 94% of all candidate lists included more men than women candidates! These numbers suggest that the biggest bias against women candidates is still at the national level.

16. As our Rapporteur for opinion on the recent report on “improving CPT selection procedures”, Mrs Wurm, pointed out a few weeks ago, “the Committee on Legal Affairs and Human Rights is trying to play “quality” against “gender equality”... This argument is a very old one and has been used in the past to try and avoid the introduction of “quotas” or other forms of gender-based positive discrimination. **What this argument does not take into account is that, like beauty, “quality” is in the eye of the beholder.** It has been proven by countless studies that selection panels tend to reproduce themselves, in particular as concerns their gender composition. In other words, regardless of the qualifications of candidates, male-dominated panels tend to select men.”<sup>8</sup>

<sup>5</sup> Article 21 of the European Convention on Human Rights.

<sup>6</sup> Information from the website of the Maltese Ministry of Justice and Home Affairs, <http://www.mjha.gov.mt/justice/judiciary.html>, last updated 14 February 2007.

<sup>7</sup> See composition of the Chamber of Advocates of Malta:

[http://www.chamberofadvocatesmalta.org/chamberofadvocates/lawyer\\_search.aspx?s=all](http://www.chamberofadvocatesmalta.org/chamberofadvocates/lawyer_search.aspx?s=all).

<sup>8</sup> Doc. 11194, paragraphs 8 and 9.

17. A quick look at the gender composition of the selecting authorities at national level (governments, parliaments) reveals that most of them, if not all, are clearly male-dominated – Malta definitely is. At the level of the Assembly, the ad hoc Sub-Committee on the election of judges numbers four female titular members (24%) and thirteen male titular members (76%). The Assembly numbers the exactly same proportion itself: 24% women and 76% men. In other words, at every level of the selection procedure, the odds are stacked against female candidates.

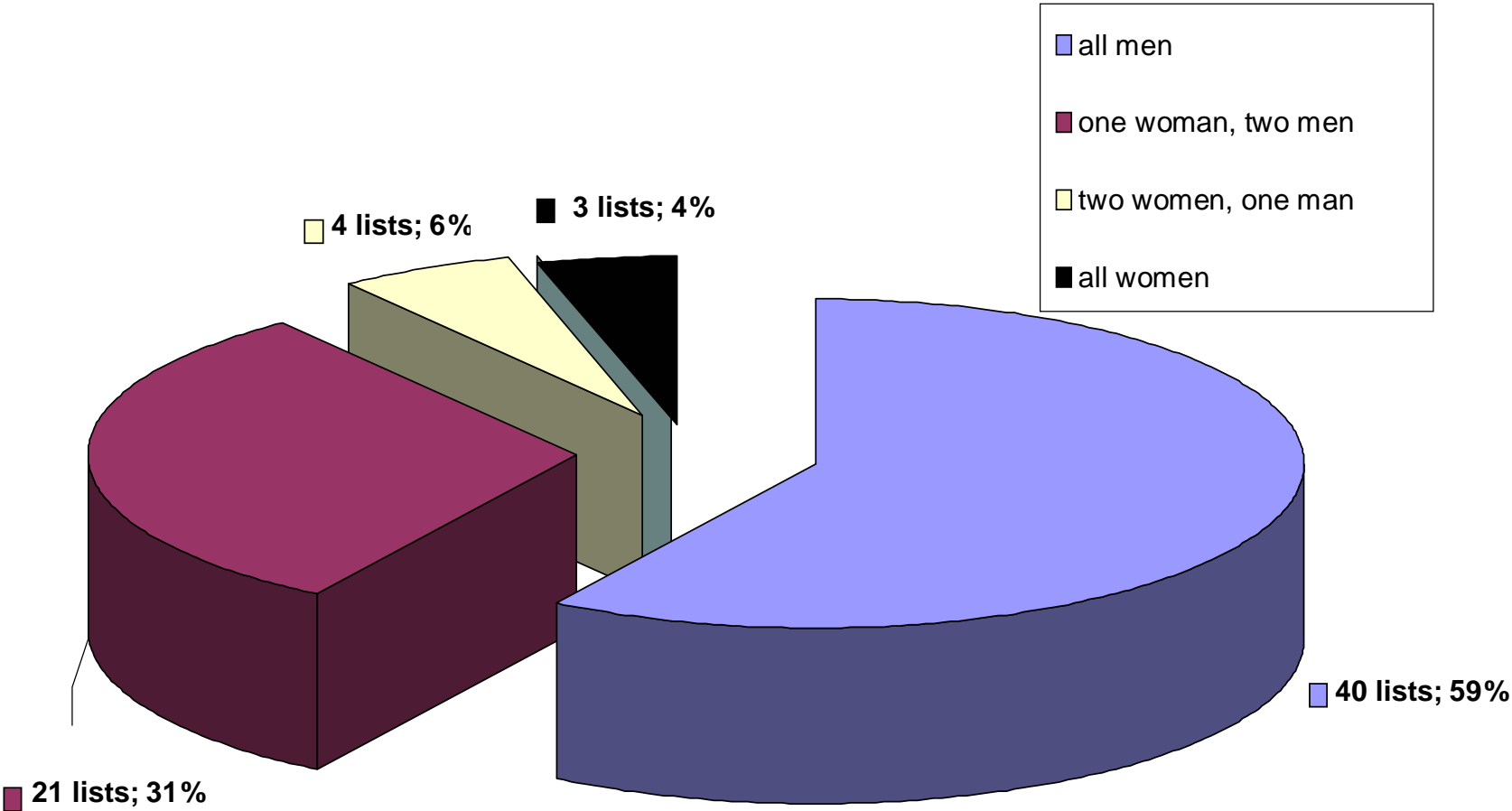
18. This is why it is necessary to continue to insist that each and every candidate list of three candidates to the European Court of Human Rights includes at least one woman. With the current representation of women on the Court at 30%, there is absolutely no reason to change that practice and allow all-male lists, which are, in fact, the result of discrimination against women at different levels of the selection procedure – even if this discrimination is not necessarily a conscious act.

19. In addition, the draft resolution submitted by the Committee on Legal Affairs and Human Rights is very widely worded, leaving it entirely to the (male dominated) Ad hoc Sub-Committee and the Committee on Legal Affairs and Human Rights to decide what the “exceptional circumstances” allowing all-male candidate lists should comprise. Since both of these bodies consider that Malta’s current case poses such “exceptional circumstances” – although Malta is a country with a population of nearly 400.000 with plenty of well-qualified female potential candidates, which also has the possibility of fielding a non-Maltese female candidate – one wonders which other countries would have the back-door opened to them to present all-male candidate lists, returning the Assembly to the *status quo ante* when it often could not elect a female judge even if it wanted to!

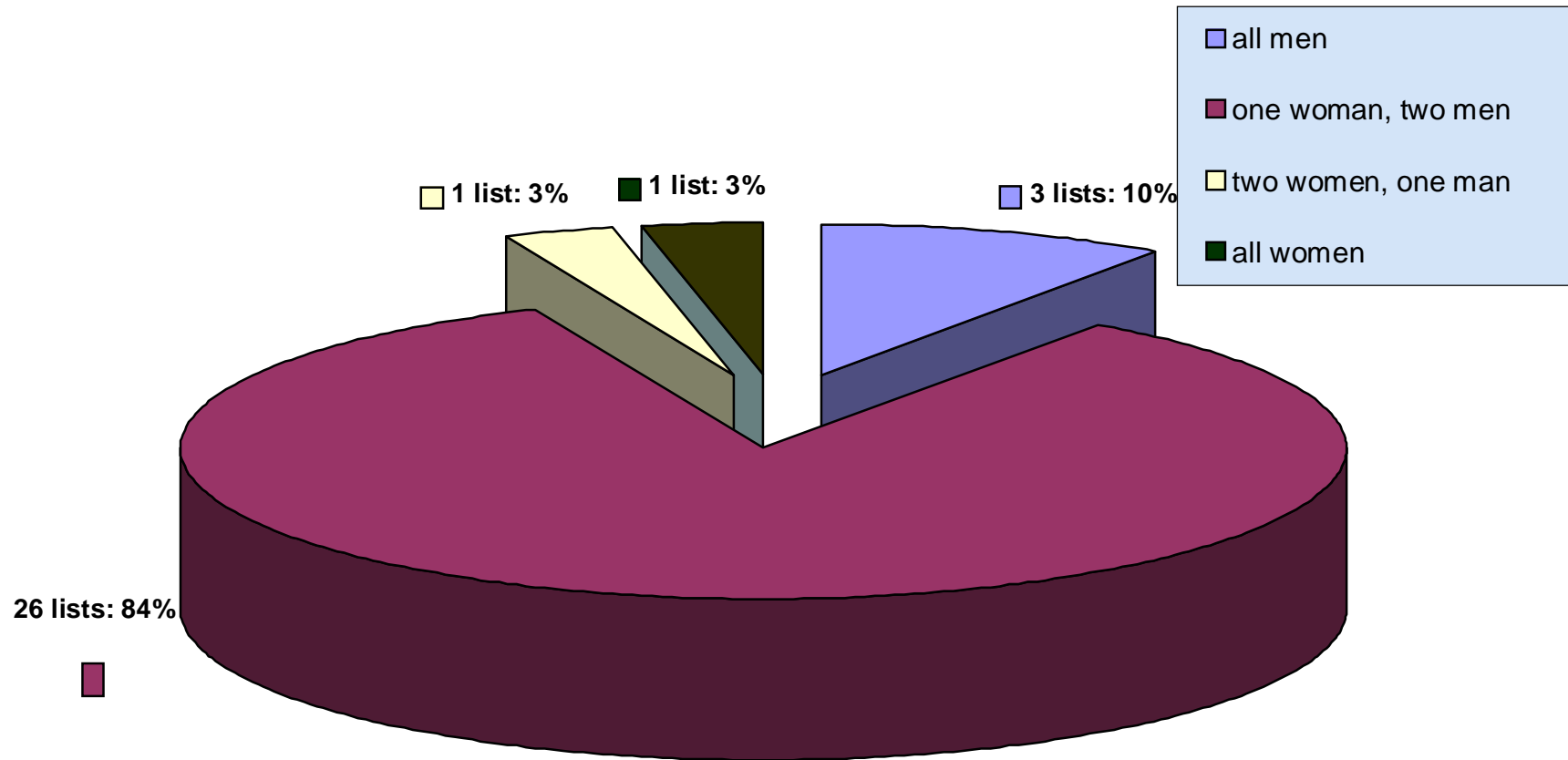
#### **D. Conclusion and recommendation**

20. I thus call on the Assembly to reject this draft resolution’s attempt to undermine gender equality. The Assembly should have the choice to elect a female judge to the European Court of Human Rights if it wishes to do so and should not bow to the wishes of one single country which is unwilling to accept rules adopted by the Assembly with a significant majority in 2004 and 2005. I recommend that you vote “no” in the final vote on the draft resolution in the Assembly.

### Appendix I Composition of candidate lists 1998-2003



### Composition of candidate lists 2004-2006



*Reporting committee:* Committee on Legal Affairs and Human Rights

*Committee seized for opinion:* Committee on Equal Opportunities for Women and Men

*Reference to Committee:* Doc 11067, reference N°3308 of 26 January 2007

Opinion adopted by the Committee on 16 April 2007.

Secretariat of the Committee: Ms Kleinsorge, Ms Affholder, Ms Devaux, Mr Diallo