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Draft Protocol No. 12 to the European Convention on Human Rights¹

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group

Summary

The Assembly welcomes the broadening of the scope of the non-discrimination clause as proposed in draft Protocol No 12 to the European Convention on Human Rights. However, it regrets that the draft Protocol does not really fulfil its expectations, reiterated on several occasions, namely that the principle of equality between men and women be enshrined in the Convention, and that new discrimination grounds be included, taking into account the evolution of society since the signature of the Convention fifty years ago. The present opinion thus proposes amendments to this effect.

I. Draft opinion

1. The Assembly draws attention to its [Recommendations 1229](#) (1994) and [1269](#) (1995), in which it recommended that the Committee of Ministers "establish the principle of equality of rights between women and men as a fundamental human right in an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms".
2. It also draws attention to [Recommendation 1116](#) (1989), in which it recommended that the Committee of Ministers "instruct the Steering Committee for Human Rights to give priority to reinforcing the non-discrimination clause in Article 14 of the European Convention on Human Rights".
3. The Assembly has therefore been awaiting draft Protocol No. 12, which has now been submitted to it for an opinion, with impatience and interest.
4. The Assembly notes that the change introduced by the draft protocol with regard to the scope of the prohibition against discrimination lies in the fact that Article 14 is no longer limited to the rights and freedoms enshrined in the Convention but extended to "any right set forth by law".
5. It also notes that no changes have been made to the list of grounds on which discrimination is prohibited since it is considered non-exhaustive and can therefore be extended under case-law to include other grounds.
6. It believes that the enumeration of grounds in Article 14 is, without being exhaustive, meant to list forms of discrimination which it regards as being especially odious. Consequently the ground "sexual orientation" should be added.

7. Moreover, no reference is made to the principle of equal rights for women and men in the draft protocol.

8. The Assembly therefore concludes that the draft protocol does not fully meet its expectations.

9. The Assembly therefore recommends that the Committee of Ministers:

i. replace Article 1 of the draft Protocol by the following draft:

"Article 1

1. Men and women are equal before the law.

2. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

3. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 2."

ii. in Article 5, fix at ten the number of ratifications required for the entry into force of the Protocol.

II. Explanatory memorandum by Mr Jurgens

A. Introduction

1. The Committee of Ministers has asked the Assembly for its opinion on Protocol No 12 to the European Convention on Human Rights prepared by the Steering Committee for Human Rights (CDDH). The Committee of Ministers also asked the European Court of Human Rights to give its opinion. The Court adopted this opinion on 6 December 1999.

2. The CDDH had been instructed to "draft an additional protocol to the European Convention on Human Rights broadening in a general fashion the field of application of Article 14, which would contain a non-exhaustive list of discrimination grounds".

B. The shortcomings of Article 14 of the European Convention on Human Rights

3. Article 14 of the European Convention on Human Rights, currently entitled "Prohibition of discrimination", reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

4. As the CDDH points out in its draft explanatory report, the protection provided by Article 14 is limited. Indeed, Article 14 does not contain an independent prohibition against discrimination since it only prohibits discrimination with regard to "the enjoyment of the rights and freedoms set forth in [the] Convention".

5. Let us compare Article 14 to similar provisions: Article 1 of the Universal Declaration of Human Rights of 10 December 1948 proclaims that "All human beings are born free and equal in dignity and rights." This provision is almost identical to Article 1 of the French Declaration of the Rights of Man and of the Citizen of 26 August 1789: "Men are born and remain free and equal in respect of rights. Social distinctions shall be based solely upon public utility."

6. The most recent clause on this subject is that in Article 3 of the United Nations Covenant on Civil and Political Rights of 16 December 1966: "The States Parties to the present Covenant

undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

7. As can be seen, Article 14 does not go as far as these other provisions on equality since it concerns only discrimination. Having noted these differences, the Assembly has on several occasions asked that a right to equality be enshrined in the European Convention on Human Rights.

8. For example, in [Recommendation 1229](#) on equality of rights between men and women, the Assembly recommended that the Committee of Ministers "establish the principle of equality of rights between women and men as a fundamental human right in an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms".

9. In its reply to this recommendation the Committee of Ministers stated: "the Committee of Ministers shares the views of the Assembly. In September 1992, it approved specific terms of reference assigned to a group of specialists instructed to draft a 'reasoned proposal' for an additional protocol to the European Convention on Human Rights and Fundamental Freedoms, establishing a fundamental right of women and men to equality. This proposal is due to be finalised in June 1994 at the 8th meeting of the CDEG, with a view to its transmission to the Steering Committee for Human Rights (CDDH), which is the committee responsible for elaborating additional protocols to the Convention."

10. In its [Resolution 1018](#) (1994) on equality of rights between men and women, the Assembly invited the governments of member states "to include the principle of equality of rights in their respective constitutions and draw up anti-discriminatory legislation".

11. In its [Recommendation 1269](#) (1995) on achieving real progress in women's rights as from 1995, the Assembly reiterated its request that the principle of equal rights for men and women be included in an additional protocol to the European Convention on Human Rights as soon as possible.

C. The improvements introduced by draft Protocol No 12

12. What does the draft protocol propose?

13. If one disregards the articles concerning territorial application and the final provisions, the draft protocol contains only one substantive article.

14. This article (Article 1), entitled "General prohibition of discrimination", reads as follows:

"The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

1. The scope of Article 1 of the draft protocol

15. A comparison of this article and the current Article 14 shows that the only difference lies in the fact that Article 14 is extended to "any right set forth by law" instead of being confined to the rights and freedoms enshrined in the Convention.

16. This nevertheless broadens the scope of non-discrimination.

17. The wording covers the rights secured by the Convention as well as other rights secured at national level. It obviously leaves considerable scope for the case-law of the European Court of Human Rights, which will be able to interpret it in an exhaustive manner.

2. Prohibited grounds for discrimination

18. The list of prohibited discrimination grounds remains unchanged. The CDDH considered the inclusion of additional discrimination grounds unnecessary from a legal point of view since the list of discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included.

19. However, society has changed since the adoption of the Convention in 1950 and account should have been taken of the changes. Although in 1950 some legislation was apparent as to including sexual orientation in the list of grounds, now, half a century later, it has become generally accepted that this form of discrimination has led and leads to diverse forms of discrimination and even persecution. Article 14 was formulated, in 1950, to ban such forms of discrimination and persecution. The explanatory report states that this was envisaged by the CDDH, which discussed the possibility of including grounds such as disability, sexual orientation and age, but that it was considered unnecessary from a legal point of view since the list of grounds for discrimination was not exhaustive and the inclusion of any particular additional ground might give rise to unwarranted interpretations. It should, however, be noted that the Amsterdam Treaty of 2 October 1997, which amends the Treaty of the European Union, includes sexual orientation in its prohibited discrimination grounds.

20. Although it is true, as the explanatory report points out, that the Court has already applied Article 14 to discrimination grounds which are not mentioned in this provision, its case-law has not significantly broadened the scope of Article 14.

21. The list of grounds is not exhaustive since Article 14 and the new Article 1 of the draft protocol contain the words "such as". It would surely have been simpler not to give a list of grounds and to establish a general right to equality as in Article 3 of the Covenant on Civil and Political Rights. Indeed, even if the argument concerning the non-exhaustive nature of the list is admissible, there is an implicit hierarchy both in the grounds mentioned, and between those grounds and those which are not mentioned. This interpretation is, moreover, confirmed by paragraph 2 of Article 1, which reads as follows:

"No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

22. Finally, it is necessary to bear in mind the hearing on the situation of lesbians and gays held by the Committee on Legal Affairs and Human Rights in October 1999, which could give rise to a recommendation in favour of the inclusion of sexual orientation in the prohibited discrimination grounds. Clearly the issue of discrimination because of sexual orientation has, since 1950, become accepted as being of the same magnitude as the grounds listed in the original text of Article 14.

23. Sexual orientation appears as a prohibited ground of discrimination in the legislation of eleven member States. However, lesbians and gay men are still victims of severe discrimination in some other European countries and only express recognition of the ground "sexual orientation" could protect them.

D. What Protocol No. 12 does not acknowledge

24. The preamble reads:

"The member states of the Council of Europe ... being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms ...".

25. This does not correspond to the content of the protocol, which, as already stated, does not enshrine the principle of equality but extends the principle of non-discrimination, already set forth in the initial Convention in 1950, to include other rights.

26. Moreover, the authors of the text were aware of this difference between equality and non-discrimination since, in the following paragraph, they have added the following:

"Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures".

27. They therefore implicitly acknowledge that the protocol does not guarantee equality and they accept that the states parties to the Convention may take measures to promote equality but only under certain conditions.

28. The Assembly regrets that its recommendations concerning the establishment of a general right to equality have not been taken into account.

29. The explanatory report to the draft protocol continually confuses two distinct concepts: non-discrimination and equality. The introduction, for example, states that "the general principle of equality and non-discrimination is a fundamental element of international human rights law" and subsequently that "the protection provided by Article 14 with regard to equality and non-discrimination is limited".

30. With regard to equality between women and men, it should first be noted that the explanatory report ignores the aforementioned recommendations of the Assembly in this respect and refers only to the work of the Steering Committee for Equality between Women and Men (CDEG). It explains that the CDDH agreed to approach the issue of equality between women and men from the point of view of the principle of the universality of human rights, and had reservations about a protocol based on a sectoral approach.

31. The Assembly is aware that in several constitutions of member States sex is listed – like in the present Article 14 of the ECHR – as one of the grounds which cannot justify discrimination.

32. However, since Article 14 was formulated in 1950, the development of opinion in the matter of human rights has been such that, at this moment, to stress equality between men and women can no longer be considered to be just a sectoral approach. Indeed, at that time the Grundgesetz of Germany had already formulated the equality of men and women separately in Article 3 section 2: "Männer und Frauen sind gleichberechtigt" (ie "men and women are equal before the law").

33. In section 3, the same Article 3 then goes on to prohibit putting anyone at a disadvantage or giving anyone an advantage because of specific qualities. The list of qualities includes sex ("Geschlecht").

34. In a modernised version of Article 14 it would seem that at least this example should be followed by formulating the equality of men and women separately, as something that is presupposed when discussing the content of human rights. The human race is made up of men and women. One cannot, therefore, equate men or women with a category or group. When that has been accepted, it is in itself a matter of legal technicality if one wishes to reiterate this equality by including sex in the list of grounds which cannot justify being treated differently from other citizens. Such a listing could be of importance to influence the case-law of the Court.

35. The list of grounds in Article 14 is not exhaustive. The grounds included (such as race, sex, political or religious persuasion, sexual orientation, ethnic origin) are not listed because they are comparable with each other as to their content. They have been selected because we have learnt to regard discrimination on these grounds to be the most insidious and obnoxious forms of discrimination. That is the reason why sexual orientation should now be added to the list.

36. Having noted the proposals of the CDDH with regard to Article 14, the Assembly wishes to reiterate its request that the principle of equality between men and women be separately enshrined in the ECHR and that the grounds listed in Article 14 of the ECHR be complemented by the grounds "sexual orientation".

37. It finally proposes to fix at ten the number of ratifications necessary for the entry into force of the Protocol.

E. Conclusions

38. Although the Assembly is in favour of extending Article 14, it regrets that draft Protocol No. 12 does not really fulfil its expectations.

39. It realises that this draft protocol is the result of a compromise but wishes, nevertheless, to make the following proposals:

- the principle of equality between men and women should be enshrined separately in the ECHR;

- the grounds listed in Article 1 paragraph 2 should be complemented by the ground "sexual orientation".

Reporting committee: Committee on Legal Affairs and Human Rights

Budgetary implications for the Assembly: none

Reference to committee: [Doc 8490](#) and Reference No. 2428 of 20 September 1999

Draft opinion adopted by the committee on 10 January 2000 with 25 votes in favour, 2 votes against and 1 abstention

Members of the committee: MM Jansson (*Chairperson*), Bindig, Frunda, Moeller (*Vice-Chairpersons*), Mrs Aguiar, MM Akçali, Arzilli, Attard Montalto, Bal, Bartumeu Cassany, Brand, Bulic, Clerfayt, Columberg, Contestabile, Demetriou, Derycke, Enright, Mrs Err, Mrs Frimansdóttir, Mr Fyodorov, Ms Hlavac, Mr Holovaty (alternate: Mr Zvarych) Mrs Imbrasiene, MM Jaskiernia, Jurgens, Kelam, Kelemen, Lord Kirkhill, MM König, Kresak, Mrs Krzyzanowska, Mr Le Guen, Ms Libane, MM Lintner, Loutfi, Magnusson, Mancina, Mrs Markovic-Dimova, MM Martins, Marty, McNamara, Mozetic, Mrs Näslund, MM Nastase, Pavlov, Pollo, Polydoros, Mrs Pourtaud, MM Robles Fraga, Rodeghiero, Mrs Roth, Mrs Roudy, MM Saakashvili, Shishlov, Simonsen, Solé Tura, Solonari, Svoboda, Symonenko, Tabajdi, Verhagen, Verivakis, Vishnyakov, Vyvadil, Mrs Wohlwend.

N.B. The names of those members who took part in the vote are printed in italics.

Secretaries to the committee: Mr Plate, Ms Coin and Ms Kleinsorge

¹ See [Doc 8490](#).