Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 177)

Explanatory Report

Introduction

1. Article 1 of the Universal Declaration of Human Rights proclaims: "All human beings are born free and equal in dignity and rights". The general principle of equality and non-discrimination is a fundamental element of international human rights law. It has been recognised as such in Article 7 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights and in similar provisions in other international human rights instruments. The relevant provision in the European Convention on Human Rights (ECHR) in this respect is Article 14. However, the protection provided by Article 14 of the Convention with regard to equality and non-discrimination is limited in comparison with those provisions of other international instruments. The principal reason for this is the fact that Article 14, unlike those provisions in other instruments, does not contain an independent prohibition of discrimination, that is, it prohibits discrimination only with regard to the "enjoyment of the rights and freedoms" set forth in the Convention. Since 1950, certain specific further guarantees concerning only equality between spouses have been laid down in Article 5 of Protocol No. 7 to the ECHR.

2. Various ways of providing further guarantees in the field of equality and non-discrimination through a protocol to the Convention have been proposed or studied from the 1960s onwards by both the Parliamentary Assembly and the competent intergovernmental committees of experts of the Council of Europe. An important fresh impetus was given by work carried out in recent years in the field of equality between women and men and that of combating racism and intolerance. The European Commission against Racism and Intolerance (ECRI), the Steering Committee for Equality between Women and Men (CDEG) and the Steering Committee for Human Rights (CDDH), have actively considered a possible reinforcement of ECHR guarantees in these two areas.

3. Participants at the 7th International Colloquy on the European Convention on Human Rights (Copenhagen, Oslo and Lund, from 30 May to 2 June 1990) affirmed that the principles of equality and non-discrimination are fundamental elements of international human rights law. With regard to the possibility of broadening, through the development of the Strasbourg case-law, the protection offered by Article 14 of the Convention beyond the above-mentioned limit (see paragraph 1 above), participants recognised that there was little scope for further expansion of the case-law on this score since the prohibition in Article 14 is clearly accessory to the other, substantive guarantees in the Convention.

4. Since 1990, the examination of a possible strengthening of the Convention's guarantees with regard to equality and non-discrimination was initially pursued separately, and from specific standpoints, by the Steering Committee for Equality between Women and Men and the European Commission against Racism and Intolerance.

5. In the course of its work, the CDEG underlined the fact that there is no legal protection for equality between women and men as an independent fundamental right in the context of the binding instruments of the Council of Europe. Considering that a legal norm to that effect is one of the prerequisites for achieving de jure and de facto equality, the CDEG focused the major part of its activities on the inclusion in the European Convention on Human Rights of a fundamental right of women and men to equality. The work of the CDEG resulted in a reasoned proposal to include such a right in a protocol to the ECHR. In 1994, the Committee of Ministers instructed the Steering Committee for Human Rights to consider the necessity for and the feasibility of such a measure, taking into consideration, inter alia, the report submitted by the CDEG. On the basis of the work of its Committee of Experts for the Development of Human Rights (DH-DEV), the CDDH agreed in October 1996 that there was a need for standard-setting work by the Council of Europe in the field of equality between women and men but expressed reservations, from the point of view of the principle of universality of human rights, about a draft protocol based on a sectoral approach. Further to a request made by the CDDH, the Committee of Ministers subsequently (in December 1996) instructed the CDDH to examine, and submit proposals for, standard-setting solutions regarding equality between women and men other than a specific draft protocol to the ECHR.

6. In the meantime, work in the Council of Europe on the problem of racism and intolerance had intensified as a direct result of the 1st Summit of Heads of State and Government of its member States, held in Vienna on 8 and 9 October 1993. The Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance adopted at this meeting expressed alarm over the resurgence of these phenomena as well as the development of a climate of intolerance. As part of a global approach for tackling these problems set out in the Plan of Action, the heads of state and government agreed to establish the European Commission against Racism and Intolerance and gave it, among other things, the task of working on the strengthening of the guarantees against all forms of discrimination and, in that context, studying the applicable international legal instruments with a view to their reinforcement where appropriate.

7. Having studied all existing international human rights instruments which deal with discrimination issues, ECRI submitted its findings to the Committee of Ministers. ECRI considered that the protection offered by the ECHR from racial discrimination should be strengthened by means of an additional protocol containing a general clause against discrimination on the grounds of race, colour, language, religion or national or ethnic origin. In proposing a new protocol, ECRI recognised that the law alone cannot eliminate racism in its many forms vis-à-vis various groups, but it stressed also that efforts to promote racial justice cannot succeed without the law. ECRI was convinced that the establishment of a right to protection from racial discrimination as a fundamental human right would be a significant step towards combating the manifest violations of human rights which result from racism and xenophobia. It emphasised that discriminatory attitudes and racist violence are currently spreading in many European countries and observed that the resurgence of racist ideologies and religious intolerance is adding to daily tension in our societies an attempt to legitimise discrimination.

8. In the light of ECRI's proposal, the Committee of Ministers decided in April 1996 to instruct the Steering Committee for Human Rights to examine the advisability and feasibility of a legal instrument against racism and intolerance taking account of ECRI's reasoned report on the reinforcement of the non-discrimination clause of the ECHR.

9. On the basis of preparatory work done by the DH-DEV, which included the identification of arguments for and against possible standard-setting solutions (namely, an additional protocol based on ECRI's proposal; an additional protocol broadening, in a general fashion, the field of application of Article 14; a framework convention or other convention; or a recommendation of the Committee of Ministers), the CDDH adopted, in October 1997, a report for the attention of the Committee of Ministers concerning both the question of equality between women and men and that of racism and intolerance. The CDDH was of the opinion that an additional protocol to the ECHR was advisable and feasible, both as a standard-setting solution regarding equality between women and men and as a legal instrument against racism and intolerance.

10. It was on the basis of this report that, at the 622nd meeting of the Ministers' Deputies (10-11 March 1998), the Committee of Ministers gave the CDDH terms of reference to draft an additional protocol to the European Convention on Human Rights broadening in a general fashion the field of application of Article 14, and containing a non-exhaustive list of discrimination grounds.

11. The CDDH and its committee of experts, the DH-DEV, elaborated the draft protocol and an explanatory report in 1998 and 1999. As had been the case during previous stages of this activity, the CDEG and ECRI were associated with this work through their representatives. During this period, further support for the rapid conclusion of the elaboration of the draft protocol was expressed by the participants at the European regional colloquy "In Our Hands – The Effectiveness of Human Rights Protection 50 Years after the Universal Declaration" (Strasbourg, 2-4 September 1998), organised by the Council of Europe as a contribution to the commemoration of the 50th anniversary of the Universal Declaration of Human Rights, and in the political declaration adopted by the Committee of Ministers on 10 December 1998 on the occasion of the same anniversary.

12. The CDDH, after having consulted the European Court of Human Rights and the Parliamentary Assembly, finalised the text of the draft protocol at an extraordinary meeting held on 9 and 10 March 2000 and decided to transmit it, together with the draft explanatory report, to the Committee of Ministers.

13. The Committee of Ministers adopted the text of the Protocol on 26 June 2000 at the 715th meeting of the Ministers' Deputies and opened it for signature by member states of the Council of Europe on 4 November 2000.

Commentary on the provisions of the Protocol

Preamble

14. The brief Preamble refers, in the first recital, to the principle of equality before the law and equal protection of the law. This is a fundamental and well-established general principle, and an essential element of the protection of human rights, which has been recognised in constitutions of member states and in international human rights law (see also paragraph 1 above).

15. While the equality principle does not appear explicitly in the text of either Article 14

of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists (see paragraph 18 below). The Court, in its case-law under Article 14, has already made reference to the "principle of equality of treatment" (see, for example, the Court's judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A, No. 6, paragraph 10) or to "equality of the sexes" (see, for example, the judgment of 28 May 1985 in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, Series A, No. 94, paragraph 78).

16. The third recital of the preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them (this principle already appears in certain existing international provisions: see, for example, Article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women and, at the regional level, Article 4, paragraph 3, of the Framework Convention for the Protection of National Minorities). The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities and Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination). However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable.

Article 1 – General prohibition of discrimination

17. This article contains the main substantive provisions of the Protocol. Its wording is based on the following general considerations.

18. The notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the judgment in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judgment of 28 May 1985, Series A, No. 94, paragraph 72). The meaning of the term "discrimination" in Article 1 is intended to be identical to that in Article 14 of the Convention. The wording of the French text of Article 1 ("sans discrimination aucune") differs slightly from that of Article 14 ("sans distinction aucune"). No difference of meaning is intended; on the contrary, this is a terminological adaptation intended to

reflect better the concept of discrimination within the meaning of Article 14 by bringing the French text into line with the English (see, on this precise point, the Court's judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A, No. 6, paragraph 10).

19. Since not every distinction or difference of treatment amounts to discrimination, and because of the general character of the principle of non-discrimination, it was not considered necessary or appropriate to include a restriction clause in the present Protocol. For example, the law of most if not all member states of the Council of Europe provides for certain distinctions based on nationality concerning certain rights or entitlements to benefits. The situations where such distinctions are acceptable are sufficiently safeguarded by the very meaning of the notion "discrimination" as described in paragraph 18 above, since distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, it should be recalled that under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background (see, for example, the judgment of 28 November 1984 in the case of Rasmussen v. Denmark, Series A, No. 87, paragraph 40). For example, the Court has allowed a wide margin of appreciation as regards the framing and implementation of policies in the area of taxation (see, for example, the judgment of 3 October 1997 in the case of National and Provincial Building Society and Others v. the United Kingdom, Reports of Judgments and Decisions 1997-VII, paragraph 80).

20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-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. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of Salgueiro da Silva Mouta v. Portugal).

21. Article 1 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention".

22. In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

i. in the enjoyment of any right specifically granted to an individual under national law;

ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

23. In this respect, it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category.

24. The wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties under this provision. This concerns the question to what extent Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called "indirect horizontal effects"). The same question arises as regards measures to remedy instances of discrimination. While such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals.

25. On the one hand, Article 1 protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons. An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination (see the comment on Article 3 in paragraph 32 below).

26. On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play (see, mutatis mutandis, the judgment of the Court of 26 March 1985 in the case of X and Y v. the Netherlands, Series A, No 91, paragraphs 23-24, 27 and 30).

27. Nonetheless, the extent of any positive obligations flowing from Article 1 is likely to be limited. It should be borne in mind that the first paragraph is circumscribed by the reference to the "enjoyment of any right set forth by law" and that the second paragraph prohibits discrimination "by any public authority". It should be noted that, in addition, Article 1 of the Convention sets a general limit on state responsibility which is particularly relevant in cases of discrimination between private persons.

28. These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention.

29. The first paragraph of Article 1 refers to "any right set forth by law". This expression seeks to define the scope of the guarantee provided for in this paragraph and to limit its possible indirect horizontal effects (see paragraph 27 above). Since there may be some doubt as to whether this sentence on its own covers all four elements which constitute the basic additional scope of the Protocol (the question could arise in particular with respect to elements iii and iv – see paragraph 22 above), it should be recalled that the first and second paragraphs of Article 1 are complementary. The result is that those four elements are at all events covered by Article 1 as a whole (see paragraph 23 above). The word "law" may also cover international law, but this does not mean that this provision entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments.

30. The term "public authority" in paragraph 2 has been borrowed from Article 8, paragraph 2, and Article 10, paragraph 1, of the Convention and is intended to have the same meaning as in those provisions. It covers not only administrative authorities but also the courts and legislative bodies (see paragraph 23 above).

Article 2 – Territorial application

31. This is the territorial application clause contained in the Model Final Clauses adopted by the Committee of Ministers in February 1980. Paragraph 5 follows closely Article 56, paragraph 4 of the Convention.

Article 3 – Relationship to the Convention

32. The purpose of this article is to clarify the relationship of this Protocol to the Convention by indicating that all the provisions of the latter shall apply in respect of Articles 1 and 2 of the Protocol. Among those provisions, attention is drawn in particular to Article 53, under the terms of which "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party". It is clear that this article will apply in the relations between the present Protocol and the Convention itself. It was decided not to include a reference to Article 16 of the Convention in this Protocol.

33. As has already been mentioned in paragraph 21 above, Article 1 of the Protocol encompasses, but is wider in scope than the protection offered by Article 14 of the Convention. As an additional Protocol, it does not amend or abrogate Article 14 of the Convention, which will therefore continue to apply, also in respect of States Parties to the Protocol. There is thus an overlap between the two provisions. In accordance with Article 32 of the Convention, any further questions of interpretation concerning the precise relationship between these provisions fall within the jurisdiction of the Court.

Article 4 – Signature and ratification

Article 5 – Entry into force

Article 6 - Depositary functions

34. The provisions of Articles 4 to 6 correspond to the wording of the Model Final Clauses adopted by the Committee of Ministers of the Council of Europe.