

Topic two: How to prepare ratification in practice?

Position of the Parliamentary Assembly

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Since the European system of human rights protection was first established, a somewhat paradoxical situation has been apparent: while non-discrimination is recognized as a cornerstone of modern understanding of human rights, the corresponding provision of the European Convention of Human Rights (ECHR), i.e. Article 14, has a rather limited scope of application, and hence the relevant case-law of the Court was also limited.

The Parliamentary Assembly constantly advocated the extension of the ECHR so that a general anti-discrimination clause be incorporated. In particular, Recommendation 1116 (1989) maintains: "The Assembly, Recommends 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... by drawing up a general clause on equality of treatment before the law."

Thus, the Assembly cannot but wholeheartedly appreciate entry into force of the 12th Protocol.

However, a number of problems are also evident or should be anticipated in the near future.

1. Ratification by all member States

So far the 12th Protocol has mostly been ratified by those member States which joined the Council of Europe more recently, and for some of whom ratification was a formal commitment before the Council of Europe in the framework of the monitoring of compliance with the country's obligations and commitments. In the meantime, most of the founding States, that is to say the "old democracies" have not ratified, and some have not even signed the Protocol (e.g. Denmark, France, Spain, Sweden, Switzerland, United Kingdom, together with Bulgaria, Poland, Lithuania etc).

What is the reason for this delay in ratification? At the moment many States are reluctant to undertake new, even formal, commitments in the field of human rights and prefer to look to the others: "we will ratify as soon as others do".

Some States with well-developed anti-discrimination legislation and practices (the UK being probably the most articulate case) used to put forward two main arguments against speedy ratification: first, there already exists a quite efficient system of combating discrimination which in many respects goes beyond the requirements of the Protocol; second, the Protocol has certain deficiencies, and it is not clear how it will be applied by the Court. While both arguments are no doubt true to a considerable extent, I still fail to see how the conclusion that the Protocol should not be ratified could be derived from them.

What can the Assembly and the Council of Europe do to encourage ratification? A number of measures might be suggested:

- a special report on obstacles to ratification and possible measures to overcome them could be prepared by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly;

- the Assembly's Monitoring committee could pay special attention to this issue in its thematic country-by-country approach;
- an active position of the Secretary General advocating ratification of Protocol No. 12 as a priority could be very effective;
- the Committee of Ministers could consider holding a "*tour de table*" on ratification.

However, all these measures will have limited effectiveness unless a substantial number of member States demonstrate the necessary responsibility and courage to make Protocol No. 12 a living instrument.

2. Interpretation of the Protocol: equality vs non-discrimination

The Assembly's rapporteur Mr Jurgens stressed in his report in January 2000 that the preamble "...does not correspond to the content of the protocol, which... 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. 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."

Thus, the future case-law of the Court will be of utmost importance in two respects:

2.1. First, evaluation of proportionality. In an increasing number of recent cases, the Court concluded that the national judicial authorities are in a better position to assess proportionality of introduced differences in treatment, and was

therefore reluctant to reconsider the views taken at national level. Further development of this trend in applying Protocol No. 12 would be counterproductive for its effective implementation.

2.2. Interpretation of non-discrimination not only as equal treatment in equal situations, but also as different treatment when it is needed to ensure full and effective equality, as it was stated in the Thlimmenos judgment of 6 April 2000 (application no. 34369/97): "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." It remains to be seen whether the Protocol will be interpreted by the Court in the same way.

3. Successful continuation and completion of the reform of the Court

Apparently, the entry into force of Protocol No. 12 might further increase substantially the number of applications, and the capacities of the Court must correspond to this new anticipated wave of cases.

4. Synergy with the EU non-discrimination directives (2000/43 and 2000/78)

The latter puts obligations also on private actors, explicitly prohibiting indirect discrimination, and envisaging the important principle of shifting the burden of proof. The two instruments have different mechanisms. Thus, the dilemmas arise similar to

those discussed when the EU Charter of Fundamental Rights was under consideration, i.e. the need to avoid two sets of human rights standards in Europe. To avoid this danger, close cooperation and uniform interpretation of non-discrimination provisions are essential. The Council of Europe member States which are not EU member States should, nevertheless, apply the provisions of Protocol No. 12 taking into account the main principles of the directives, in particular, shifting the burden of proof.