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NATIONAL PARLIAMENTS AND INTERNATIONAL HUMAN RIGHTS LAW: IMPLEMENTATION OF THE PRINCIPLE OF NON-DISCRIMINATION

Background document prepared by the Secretariat upon the instruction of the President of the Parliamentary Assembly of the Council of Europe

I. The principle of non-discrimination as an integral part of international human rights law

The principle of non-discrimination is an integral part of human rights (see in particular Article 7 of the Universal Declaration of Human Rights of 10 December 1948 and Article 26 of the International Covenant on Civil and Political Rights of 16 December 1966). Most of the universal instruments of international law provide for a broad scope of this principle by stipulating that individuals should be entitled without any discrimination to equal protection of the law. In the system of the European Convention on Human Rights (the "Convention"), Article 14 of this Convention has a more limited scope, since it applies only to the "rights and freedoms as set forth in this Convention". Even though the number of cases under Article 14 has been constantly increasing in the last few years, in particular concerning racial discrimination¹, this provision has always been treated as an auxiliary one and is not seen as an effective or adequate tool for combating discrimination in Europe.

Article 1 of Protocol No 12 to the Convention, which entered into force on 1/04/2005, extends the scope of the principle of non-discrimination, by prohibiting any discrimination "in the enjoyment of any right set forth by law" and therefore is more in line with the universal standards on human rights protection than Article 14 of this Convention. The European Court of Human Rights (the "European Court") adjudicated for the first time on the principle of non-discrimination as set forth in Protocol No 12 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*.² The European Court recalled that 'discrimination' means "treating differently, without an objective and reasonable justification, persons in similar situations", as per the Article 14 case law on the meaning of 'discrimination'³ and also reiterated that racial discrimination is a "particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."⁴ It will be interesting to see how the Protocol No 12 case law will evolve, in particular concerning the interpretation of "any right set forth by law" and the application of the non-discrimination principle to situations concerning private parties through the notion of the state's failure to fulfil positive obligations deriving from the Convention.

Since the 1960's the Parliamentary Assembly of the Council of Europe (CoE) has always promoted the idea of strengthening the non-discrimination principle (see in particular Recommendation 2345(1960), Recommendations 1269(1995) and 1229(1994) concerning equality of rights between women and men and Recommendation 1116(1989) on reinforcing the non-discrimination clause in Article 14 of the Convention). It encouraged the member states of the CoE to draft and then to sign/ratify Protocol No 12 to the Convention. However, concerning the scope of application of the non-discrimination principle set forth in Protocol No 12,

¹ See amongst others *Nachova and Others v. Bulgaria*, European Court of Human Rights, judgment of 6/07/2005, Application No 43577/98, and *Moldovan, and Others v. Romania N° 2*, European Court of Human Rights, judgment of 12 July 2005, Applications No. 41138/98; 64320/01.

² European Court of Human Rights, judgment of 22 December 2009, Applications Nos. 27996/06 and 34836/06. The case held that the inability of a Roma and a Jew to stand for election to highest political posts in the country amounts to discrimination under Article 14 and Article 1 of Protocol 12.

³ *Sejdic and Finci v. Bosnia and Herzegovina*, at para 55.

⁴ *Sedjic and Finci v. Bosnia and Herzegovina*, at para 43.



the Assembly was also dissatisfied with the lack of a special provision on equal treatment of men and women (see opinion No 216 (2000)).

II. State of ratifications of Protocol No 12

The Parliamentary Assembly of the CoE is disappointed with the low number of ratifications of Protocol No 12. So far only 17 member states of the CoE out of 47 have ratified it. 20 other member states have signed it, but not ratified it.

Out of 17 member states which ratified Protocol No 12, only 6 states are members of the European Union (EU) (Cyprus, Finland, Luxemburg, the Netherlands, Romania, Spain). Only 2 founding members of the CoE and the EU, i.e. Luxemburg and the Netherlands, have thus ratified Protocol No. 12. Most of the states which have ratified Protocol No 12 are more recent member states of the Council of Europe (Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Georgia, Montenegro, Romania, San Marino, Serbia, "the former Yugoslav Republic of Macedonia" and Ukraine). For the majority of them, the ratification of Protocol No 12 was a formal commitment taken before accession to the Council of Europe and has been followed up in the framework of the Parliamentary Assembly's monitoring of compliance with the state's obligations and commitments.

Out of the 9 states which have not signed Protocol No 12, most are members of the EU (Bulgaria, Denmark, France, Lithuania, Malta, Poland, Sweden and the UK). It is particularly striking that, amongst these states, some are founding members of the organisation (Denmark, France, Sweden, the UK).

The resistance of many EU member states to sign and/or ratify Protocol No 12 is often justified by the existence of provisions on non-discrimination in EU legislation (see in particular directives No 2000/43 and 2000/78). However, there are some differences between the relevant EU norms and the CoE standards in this area. The EU legislation is based on a sectoral approach and applies both to public and private parties, while Protocol No 12 covers all fields of national legislation and applies only to public authorities. Therefore, both sets of rules are complementary. Practice has also shown that there have been many difficulties in implementing the EU directives at the national level.

Some states are also reluctant to sign/ratify Protocol No 12 because they consider that their national legal system provides for better protection against discrimination (e.g. the UK). Moreover, this reluctance is also often related to the uncertainty about the interpretation that the European Court will give to Protocol No 12 and the concern about the increase of its workload. Therefore, certain states prefer to wait until a reform of the Court has been carried out. The forthcoming entry into force of Protocol No 14 to the Convention, on 1 June 2010, will achieve such a reform as it amends certain provisions concerning the procedures of the Court.

III. The role of national Parliaments in promoting the principle of non-discrimination

i) Promoting the signature and/or ratification of Protocol No 12

In member states which have not yet ratified Protocol No 12, national parliaments can promote the signing and/or ratifying of the latter by the competent national authorities. If the domestic legal system requires parliamentary consent for its ratification, the national parliament should give its approval for the ratification of this Protocol as soon as possible. This is necessary to ensure the full respect of the principle of non-discrimination throughout Europe, to combat all forms of discrimination, including racial discrimination, to align the CoE standards on non-discrimination with the existing universal norms on human rights protection and to avoid double-standards as between CoE member states. Member states of the CoE which are also EU member states should ratify Protocol No 12, irrespectively of existing EU legislation and, as the case may be, a high standard of protection against discrimination set forth in their national law. The existence of EU legislation on this issue should not be an obstacle, since EU members can always adopt higher standards. Furthermore, the ratification of Protocol No 12 should not be hampered by concern about the increase of the European Court's case-load. The reform of the Convention system is a separate issue which has been addressed at least for the medium-term by Protocol No 14. Furthermore parliaments can prompt the government into considering and/or accelerating the signature or ratification of Protocol No 12 through questions and campaign-type actions aimed at putting pressure on the government. Inspiration for this type of

action may be drawn from the recent CoE campaign to promote the signature and ratification of the CoE Convention on Action against trafficking in human beings, where parliamentarians were actively engaged⁵.

ii) Promoting anti-discrimination legislation

National parliaments should not only refrain from voting laws which would be contradictory with the principle of non-discrimination and therefore in violation of the Convention, but should also adopt legislation aimed at eradicating discrimination. In Resolution 1547 (2007), on the '*State of human rights and democracy in Europe*', the Parliamentary Assembly called upon all member states of the Council of Europe, and in particular their respective parliamentary bodies to combat effectively all forms of discrimination based on racial, ethnic or religious origin, gender or sexual orientation and to better protect the rights of persons belonging to national and other minorities.⁶

What is more, the Commissioner for Human Rights has consistently called for "robust and fully comprehensive" anti-discrimination legislation in all CoE member states⁷. Parliaments have a specific responsibility to initiate and support changes in legislation and policies in all major areas of activity. States should adopt and implement anti-discrimination legislation which covers all relevant grounds of discrimination, as well as multiple and compound forms of discrimination. Independent and effective equality bodies should be set up to receive complaints and monitor the implementation of the legislation.

The anti-discrimination legislation should also contain as wide a range as possible of prohibited grounds for discrimination, including not only those clearly stipulated in Article 14 of the Convention but also others, such as, for instance, sexual orientation and gender identity.

Furthermore, national non-discrimination legislation should include sanctions for infringements in order to be "effective and dissuasive towards potential perpetrators"⁸. In this regard, non-discrimination legislation can be supplemented by penal provisions against incitement to hatred and other hate crimes.

iii) Abolishing outdated legislation

National parliaments can further contribute by developing a parliamentary mechanism to screen their national legislation, so as to abolish any existing laws based on discrimination⁹. Most of all, they should revoke provisions which are not in conformity with the Convention and/or the case law of the European Court.

Where the European Court has found a violation of Article 14 of the Convention or its Protocol No 12, there is an obligation to abide by the Court's judgment. This may imply general measures to prevent a recurrence of the violation found. Indeed, very often the violations of the principle of non-discrimination have arisen from the deficiencies of the national legislation itself (see, for instance, certain cases concerning breaches of Article 14: *Marckx v. Belgium*¹⁰, *Mazurek v. France*¹¹, *Chassagnou and others v. France*¹² and *Andrejeva v.*

⁵ See Handbook for Parliamentarians: The Council of Europe Convention against trafficking in Human Beings (2009) <http://assembly.coe.int/committeedocs/2007/Trafficking-human-beingsE.pdf>.

⁶ Resolution 1547 (2007) on the '*State of human rights and democracy in Europe*,' para 34.13 – 34.15.

⁷ E.g. In his '*Contribution by the Council of Europe Commissioner for Human Rights to the Durban Review Conference*' (20-24 April 2009); see also General Policy Recommendation No 1: Combating racism, xenophobia, anti-Semitism and intolerance of the European Commission against racism and intolerance (ECRI).

⁸ Ibid.

⁹ An example of eliminating outdated legislation which was considered discriminatory was the abolition of the common law offence of blasphemy in the UK. The previous law was concerned only with protecting the Christian religion, and no other religions were afforded such protection. A report by the UK Select Committee on Human Rights recommended the law's "simple abolition," and with the introduction of the Criminal Justice and Immigration Act 2008 s.79 on 8 July 2008, the common law offence of blasphemy was abolished. See: *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 Q.B. 429, and UK Joint Committee On Human Rights *Fifteenth Report: 'Criminal Justice and Immigration Bill*,' para. 2.36 – 2.39, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/81/8105.htm#a15>. N.B. this report was preceded by Council of Europe Parliamentary Assembly Recommendation 1805 (2007) which stated that: "In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by the governments and parliaments of the member states."

¹⁰ European Court of Human Rights, judgment of 13 June 1979, Application No 6833/74.

¹¹ European Court of Human Rights, judgment of 1 February 2000, Application No 34406/97.

¹² European Court of Human Rights, judgment of 29 April 1999, Applications No 25088/94; 28331/95; 28443/95.

*Latvia*¹³). Therefore, national parliaments may be required to repeal and/or amend the existing laws, in order to fulfil the obligation to abide by the final judgments of the European Court¹⁴.

iv) Promoting positive action

Further, Parliaments can play a role in developing, in a proportionate way, the application of positive measures which can be authorised in favour of disadvantaged groups whose members do not yet enjoy fully their human rights due to past discrimination against this group. This is sometimes known as 'reverse' or 'positive' discrimination. An example might be to encourage people from particular groups to take advantage of opportunities for training and work, where the group is underrepresented (for instance, Roma). These measures may, for instance, consist in allocating places for the representatives of these groups in universities and schools and dismantling segregated schooling or develop focus-centred employment policies. Such actions could also aim at enhancing the political participation and representation of such disadvantaged groups, for example by allocating them reserved seats in Parliament, as well as in local and regional elected bodies.

These types of actions have been held to be consistent with Article 14, the European Court noting that 'certain legal inequalities tend only to correct factual inequalities.'¹⁵ Parliaments can therefore consider enacting positive measures in certain situations in the advancement of equality and diversity practices.

v) Calling Governments to account in regard to discriminatory policies

National parliaments have a crucial role to fulfil in examining government policy and calling governments to account in regard to policies which may be deemed to be discriminatory. For example, the intervention of parliamentarians was crucial in regard to the discriminatory treatment of Roma people in Italy.¹⁶

An example of how discriminatory measures may be brought into question is through recourse to Parliamentary Questions, which are often regarded as one of the best means of seeking information about the government's intentions. They may also be regarded as an effective way of raising, and perhaps resolving, grievances brought to parliamentarians' attention by constituents.

Lastly, parliamentary committees can play a vital role in investigating policy issues, proposed legislation and government activities¹⁷. Committees allow parliamentarians to examine an issue in more detail and with greater public input than at the level of the plenary parliament. Committees can gather evidence from all relevant parties and undertake their own research in order to produce reports, which should be made available to the public. Governments have a responsibility to respond to any recommendations made by the committee within a reasonable period of time. In particular, human rights committees can consider government action taken to implement judgments from both domestic courts and the European Court where breaches of the non-discrimination principle have been found. Human rights committees can also be instrumental in scrutinising all Government Bills with a view to identifying potentially discriminatory implications.

¹³ European Court of Human Rights, judgment of 18 February 2009, Application No 55707/00.

¹⁴ Article 46 of the Convention.

¹⁵ European Court of Human Rights, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,"* judgment of 23 July 1968, Application numbers 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

¹⁶ On 21 May 2008, the Council of Ministers of the Italian Government, meeting in Naples, passed a new emergency decree defining the mere presence of Roma in the areas of Campania, Lazio, and Lombardy as a state of emergency. On 28 June 2008, the Interior Minister revealed a plan for fingerprinting all Roma residents in camps, including children, insisting this was a solution to inadequate housing problems and rising crime rates.

¹⁷ In the above example on abolishing the offence of blasphemy in the UK, it was the UK Parliament Joint Committee on Human Rights which was the driving force prompting the change in a discriminatory law.

APPENDIX 1

For the most recent relevant documents of the Parliamentary Assembly, see:

Resolution 1713 and Recommendation 1904, *Minority protection in Europe: best practices and deficiencies in implementation of common standards*, 16 March 2010,

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1713.htm>

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/EREC1904.htm>

Doc 12185, report on *Discrimination on the basis of sexual orientation and gender identity*, 11 March 2010,

<http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12185.htm>

Doc. 12174, report on *The situation of Roma in Europe and relevant activities of the Council of Europe*, 26 February 2010,

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12174.htm>

Doc. 12140, report on *The wage gap between women and men*, 8 February 2010,

<http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12140.htm> ;

Resolution 1669, *The rights of today's girls: the rights of tomorrow's women*,

29 May 2009,

<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta09/erec1872.htm>;

Resolution 1547, *State of human rights and democracy in Europe*, 18 April 2007,

<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1791.htm> ;

Recommendation 1764, *The implementation of judgments of the European Court of Human Rights*, 2 October 2006,

<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1764.htm>.

APPENDIX 2Article 14 of the European Convention on Human Rights

Prohibition of discrimination

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.

Article 1 of Protocol No 12 to the European Convention on Human Rights

General prohibition of discrimination

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.