

Why should Central and Eastern European Countries Ratify Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ?

Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) – was opened for signature on 4 November 2004.

The Convention is a Council of Europe instrument.

The Convention is an international mechanism for the protection of human rights providing for an individual complaint against violations of these rights by the Contracting States to the Court in Strasbourg.

In the Protocol the Parties to the Convention

“Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

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 signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”);

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,

Have agreed as follows:

Article 1 – General prohibition of discrimination

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

Full text of the Protocol No.12:

<http://www.conventions.coe.int/Treaty/en/Treaties/Word/177.doc>

The Protocol is designed to complete the protection against discrimination provided by Article 14 of the Convention.

Article 14 reads:

“The enjoyment of the rights and freedoms set forth in [the] 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.”

However, the protection provided by Article 14 with regard to equality and non-discrimination is limited. Article 14, unlike those provisions in

other international legal instruments, does not contain an independent prohibition of discrimination. It only prohibits discrimination only with regard to the "enjoyment of the rights and freedoms" set forth in the Convention.

This language means that an individual can only complain about being discriminated against in the area defined by one of these rights, but not if discrimination concerns anything else. The Court has interpreted Protocol No. 12 in this restrictive approach in its case-law: to find a violation of a substantive right and to say that there is no need therefore to examine the complaint about the discrimination. Therefore, the protections afforded in this Protocol are not very effective. Article 1, on the other hand, affords a scope of protection against discrimination which extends beyond the enjoyment of the rights and freedoms set forth in the Convention.

The notion of discrimination in the case-law of the ECHR indicates that not every distinction or difference of treatment amounts to discrimination. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory. A difference of treatment is discriminatory if it has no objective and reasonable justification.

The existence of such a justification must be assessed in relation to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim; there also must be a "reasonable relationship of proportionality between the means employed by the public powers in respect of the individual and the aim sought to be realised".

In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the

more favourable treatment is not called for by the Convention.

Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.

However, very weighty reasons have to be put forward before a difference of treatment based on the ground of sex alone can be regarded as compatible with the Convention.

The list of grounds on which it is prohibited to discriminate against individuals in the Protocol is identical to that in Article 14 of the Convention.

This list is not exhaustive as other grounds such as physical or mental disability, sexual orientation or age can in any event be added to it by the Court's case-law. It is therefore not exhaustive.

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).

Article 1 protects against discrimination by public authorities. It 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.

However, as under the Convention the states have, in respect of certain rights, also positive obligations to undertake measures to prevent breaches of these rights in relationships between an individual and private persons or entities, it is not unconceivable that such obligations might eventually arise also in respect of non-discrimination.

The Protocol was to enter into force after ten ratifications in respect of ratifying States - entered into force on 1 April 2005

Until now has been signed by: see the attached ratification chart.

Has been ratified by: see the attached ratification chart.

Few States signed, even fewer ratified.

The issue of ratification if discussed publicly can provide a boost for a political debate on equality between women and men, or re-launch such debate if none is conducted domestically at present.

Questions to be put to political powers:

- If the Protocol has not been signed at all, why?
- If it has been signed, what are the current ratification prospects?
- What prevents the authorities from ratifying it?
- Has there been any public involvement of the society discussion on the issue of ratification?

For non-EU countries:

If ratified, the Protocol can strengthen the protection of equality by way if the individual petition to the Strasbourg Court.

For EU countries:

Primarily, the debate on ratification can highlight the equality issues and provide an impetus to review of how the anti-discrimination EU law is applied and perceived in practice, judicial or otherwise.

For those countries which ratified the Protocol:

It can be envisaged that individual applications can be brought to the Strasbourg Court to further the equality between women and men.

A litigation strategy in this respect can be worked out nationally:

- What are the problems in this area?
- Have they been identified?
- What can be done in order to identify them?
- Are there any relevant national cases pending before domestic courts?
- What channels of communications should be created in order to learn about such cases?

- Are the individuals legally represented?
- Are there national mechanisms of communication between women NGOs and legal community?

Individual application to the Court - Article 34 of the Convention:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Conditions of admissibility of individual applications:

- The same conditions apply to individual cases brought under the Convention itself and under Protocol No. 12
- Exhaustion of domestic remedies – applicable also to discrimination cases
- An application has to be lodged within six months from the final domestic decision.

Useful pages:

www.coe.int

www.echr.coe.int

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JULY 2007



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Liechtenstein	4/11/2000										
Lithuania											
Luxembourg	4/11/2000	21/3/2006	1/7/2006								
Malta											
Moldova	4/11/2000										
Monaco											
Montenegro	3/4/2003	3/3/2004	6/6/2006	56							
Netherlands	4/11/2000	28/7/2004	1/4/2005					X			
Norway	15/1/2003										
Poland											
Portugal	4/11/2000										
Romania	4/11/2000	17/7/2006	1/11/2006								
Russia	4/11/2000										
San Marino	4/11/2000	25/4/2003	1/4/2005								
Serbia	3/4/2003	3/3/2004	1/4/2005	56							
Slovakia	4/11/2000										
Slovenia	7/3/2001										
Spain	4/10/2005										
Sweden											
Switzerland											
the former Yugoslav Republic of Macedonia	4/11/2000	13/7/2004	1/4/2005								
Turkey	18/4/2001										
Ukraine	4/11/2000	27/3/2006	1/7/2006								
United Kingdom											

Total number of signatures not followed by ratifications:	22
Total number of ratifications/accessions:	15

Notes:(56) Dates of signature and ratification by the state union of Serbia and Montenegro.
a: Accession - s: Signature without reservation as to ratification - su: Succession - r: Signature "ad referendum".
R.: Reservations - D.: Declarations - A.: Authorities - T.: Territorial Application - C.: Communication - O.: Objection.

Source : Treaty Office on <http://conventions.coe.int/>