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Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christopher CHOPE, United Kingdom, European Democrat Group

Summary

The Committee on Legal Affairs and Human Rights is of the view that draft Protocol No.15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, as presently drafted, should be adopted and opened for signature and ratification by all States Parties.

The draft protocol provides for the insertion, in the Convention's preamble, of reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It also amends the Convention by providing for the possibility for judges to serve on the European Court of Human Rights until the age of 74 (the present age limit is 70).

In addition, this amending protocol streamlines the procedure of relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber, and it shortens, from six to four months, the time limit within which an application can be brought before the Court after all domestic remedies have been exhausted. It also removes one of the limits on the Court's powers to reject a case as trivial; at present the Court cannot dismiss a case on that basis if the complaint has not been duly considered by a domestic court.

1. Reference to committee: Doc. 13093, Reference 3931 of 21 January 2013.

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A. Draft opinion[2]

1. The Parliamentary Assembly is of the view that draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, "the Convention"), as submitted to it on 17 January 2013,[3] can be adopted by the Committee of Ministers and opened for signature and ratification as presently drafted, without amendment.

2. The Assembly has been kept fully aware of – and implicated in – the process leading up to the completion of the drafting process of the said draft protocol, and, in the light of the Opinion provided on this text by the European Court of Human Rights ("the Court"), on 6 February 2013, endorses:

2.1. the insertion, in the Convention's Preamble, of a reference to the principle of subsidiarity and the doctrine of the margin of appreciation, as developed in the Court's case-law;

2.2. as concerns the election of judges to the Court, the replacement of the age limit of 70 by that of a requirement that candidates be below the age of 65 on the date by which the list of three candidates is to be received by the Assembly (thereby extending *de facto* the age limit to the age of 74);

2.3. the removal, from Article 30 of the Convention, of the words "unless one of the parties to the case objects", concerning relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber;

2.4. the shortening, from six to four months, of the time limit within which an application can be brought before the Court after all domestic remedies have been exhausted, as stipulated in Article 35, paragraph 1, of the Convention;

2.5. the deletion of the present admissibility requirement, in Article 35, paragraph 3.*b*, of the Convention, which specifies that no case be rejected under this provision if it has not been duly considered by a domestic court.

3. As (draft) Protocol No. 15 is an amending protocol, it must be ratified by all the High Contracting Parties to the Convention for it to enter into force. Due to the fact that the proposed changes to the text are principally of a technical and uncontroversial nature, the Assembly urges all the Parties to the Convention, and in particular their legislative bodies, to ensure this instrument's rapid signature and ratification.

2. Draft opinion adopted unanimously by the committee on 19 March 2013.
3. Doc. 13093.

B. Explanatory memorandum by Mr Chope, rapporteur

1. Procedure

1. On 17 January 2013, the Committee of Ministers (Ministers' Deputies) invited the Parliamentary Assembly to provide it with an opinion on draft Protocol No. 15 to the European Convention on Human Rights (ETS No. 5, "the Convention").[4] This request for an opinion was transmitted by the Assembly's Bureau to the Committee on Legal Affairs and Human Rights, which appointed me rapporteur on 22 January 2013.

2. The context

2. The Committee of Ministers decision instructing the Steering Committee for Human Rights (CDDH) to prepare a draft amending protocol to the European Convention on Human Rights was taken at ministerial level on 22 May 2012. This decision was taken after substantial and at times relatively complex discussions undertaken principally, but not exclusively, in the context of three important high-level conferences held in Interlaken (February 2010), Izmir (April 2011) and Brighton (April 2012), as is explained in the explanatory report attached to the draft Protocol transmitted to the Assembly. The Parliamentary Assembly, and especially our committee, has been associated in all these developments. As a statutory body of the Council of Europe, the Parliamentary Assembly has taken, and considers itself duty-bound to take, a strong stand in securing the long-term effectiveness of Convention standards in member States.[5] It has been implicated in the three high-level conferences as well as in the drafting process itself, by the participation of a senior staff member of the Assembly at certain intergovernmental and expert meetings.[6]

3. I have it to understand that the third High Level Conference on the Future of the European Court of Human Rights, held in Brighton on 19-20 April 2012 under the United Kingdom Chairmanship of the Committee of Ministers, is the last in the cycle of such annual events. This makes sense, in that more resources should now be concentrated on the actual implementation of Convention standards in States Parties. Stressing the need to reform – and criticising – the European Court of Human Rights ("the Court") tends to mislead the public by suggesting that reform of the Court alone is needed. As noted by my eminent predecessor as Chairperson of the committee, Ms Herta Däubler-Gmelin, emphasis should be placed on problems in States which "put into jeopardy the existence of the ECHR system".[7] Statistics issued by the Court in January 2013 indicate that the Court's main "clients" are at present Russia, Turkey, Italy, Ukraine and Serbia (with, respectively, 22.3%, 13.2%, 11.1%, 8.2% and 7.8% applications pending before a judicial formation), which meant that, by the end of 2012, 62.6% of the total number of 128 100 applications pending before the Court concerned these five countries. In her report cited above, Ms Däubler-Gmelin rightly called on ministers to "name and shame" the States identified as the "big sinners" of the Convention system, indicating the need to subject persistent defaulters to "aggravated, if not "punitive" or "exemplary" damages".[8] A specific proposal to introduce "astreintes" was made by the Assembly back in 2000, but the idea has not unfortunately been followed up by

4. Doc. 13093
5. See, for example, the reports prepared by our Committee on "Effective implementation of the European Convention on Human Rights: the Interlaken process" (Doc. 12221), resulting in the adoption of Assembly Resolution 1726 (2010), and "Guaranteeing the authority and effectiveness of the European Convention on Human Rights" (Doc.12811), on the basis of which the Assembly adopted Resolution 1856 (2012) and Recommendation 1991 (2012). For an up-to-date and comprehensive overview see AS/Jur background document "The future of the European Court of Human Rights and the Brighton Declaration", AS/Jur (2012) 42, at http://assembly.coe.int/CommitteeDocs/2012/ajdoc42_2012.pdf.
6. See the special website dedicated to inter-governmental work on Court reform at www.coe.int/reformECHR, passim.
7. See "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process", Conclusions of the committee's Chairperson, Ms Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009, document AS/Jur (2010) 06 at: http://assembly.coe.int/CommitteeDocs/2010/20100121_ajdoc06%202010.pdf.
8. Ibid., paragraphs 4-9.

the Committee of Ministers.[9] I note that intergovernmental work will shortly turn to considering the introduction of "more effective measures" for the non-timely implementation of Court judgments; this would represent a good opportunity for the States Parties to properly examine the Assembly's proposal.

4. That said, the Brighton Declaration[10] was politically significant in that it reaffirmed member States deep and abiding commitment to the Convention, the pre-eminent role of the Court, and their attachment to the right of individual application. The Declaration also highlighted the important role played by the Parliamentary Assembly and national parliaments, to which scant reference had been made at Interlaken and Izmir.[11] The Declaration, – as well as the decisions taken by Ministers on 22 May 2012 – put into place a relatively rigid time frame for States to focus on the most effective manner in which the future of the Convention system can be assured, including an April 2013 deadline by which a draft of Protocol No. 15 should be submitted.

5. The reforms required by the Brighton Declaration, in so far as Protocol No. 15 is concerned, are principally of a technical and uncontroversial nature, which I believe the Assembly can readily endorse. Indeed, in drafting this opinion, I take particular note of the fact that this has already been done by the Court in its Opinion of 6 February 2013 (the text of which is appended to this explanatory memorandum).

6. Firstly, in respect of the wording of the Preamble of the Convention, member States agreed to the need to insert specific reference to the principle of subsidiarity and to the doctrine of the margin of appreciation.[12] Secondly, as regards the substance of the Convention itself, amendments concern four specific matters: i) the replacement of the age limit of 70 by that of a requirement that candidates be below the age of 65 on the date by which the list of three candidates is to be received by the Assembly (thereby extending *de facto* the age limit to the age of 74);[13] ii) the removal, from Article 30 of the Convention, of the words "unless one of the parties to the case objects", concerning relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber;[14] iii) the shortening, from six to four months, of the time limit within which an application can be brought before the Court after all domestic remedies have been exhausted, as stipulated in Article 35, paragraph 1, of the Convention;[15] and iv) the deletion of the present admissibility requirement in Article 35, paragraph 3.*b*, of the Convention, which specifies that no case be rejected under the criterion of absence of "significant disadvantage" if it has not been duly considered by a domestic court.[16] Each of these proposed amendments to the Convention will now be examined in turn.

3. The main provisions of draft Protocol No. 15 to the European Convention on Human Rights

3.1. Preamble to the Convention: Article 1 of the amending Protocol

7. Express reference will be added, in a new recital at the end of the Preamble of the Convention, to the principle of subsidiarity and the doctrine of the margin of appreciation.

8. As concerns the addition of the well-established principle of subsidiarity, this can only be welcomed. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level. The

9. In its Recommendation 1477 (2000) on execution of judgments of the European Court of Human Rights the Assembly recommended amending the Convention to introduce a system of "astreintes" (fines for a delay in the performance of a legal obligation) to be imposed on States that persistently fail to execute a Court judgment. See also the Assembly's recent Recommendation 2007 (2013) on ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties, paragraph 2 of which reads "The Assembly reiterates its call in Recommendations 1764 (2006) and 1955 (2011) to increase pressure and take firmer measures in cases of dilatory and continuous non-compliance with the Court's judgments by States Parties."

10. Text available in AS/Jur (2012) 42, see footnote 4 above.

11. See, in this connection, Assembly Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe, paragraph 5.2. See also A. Drzemczewski, "The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court", Netherlands Quarterly of Human Rights, Vol. 28/2 (2010), pp. 164-178, at p.165. See also Doc.12811, op. cit., paragraphs 55-57.

12. Brighton Declaration, B. Interaction between the Court and national authorities, paragraph 12.b.

13. Brighton Declaration, E. Judges and jurisprudence of the Court, paragraph 25.f.

14. Ibid., paragraph 25.d.

15. Brighton Declaration, C Applications to the Court, paragraph 15.a.

16. Ibid., paragraph 15.c.

Convention places primary responsibility on States Parties to secure fundamental rights and freedoms to everyone within their jurisdiction (Article 1) and to provide effective remedies for allegations of violations (Article 13), and the Court should be seized only "after all domestic remedies are exhausted" (Article 35, paragraph 1). Subsidiarity and, to a certain extent, the related doctrine of a "margin of appreciation," as developed by the Court,[17] require that the Strasbourg Court plays a complementary role to domestic court decisions and legislation: States have the duty to integrate Convention standards, as interpreted by the Court, within their own legal systems. In other words, the principle of subsidiarity has two aspects: one procedural, requiring individuals to go through all the relevant procedures at national level before seizing the Court, and the other substantive, based on the assumption that States are, in principle, better placed to assess the necessity and proportionality of specific measures that may interfere with certain rights. That said, a State can and often does guarantee a higher level of protection, and the Court obviously accords certain latitude to the domestic authorities to strike their own balance regarding Convention rights, guided by the relevant European case-law. But the Court has the final say on the interpretation of the Convention in all cases brought before it. Needless to add, no "margin of appreciation" exists with respect to the Convention's non-derogable rights in matters of life and death, torture or slavery (Articles 2, 3 and 4), Hence the importance of bearing in mind, as indicated in paragraph 7 of the explanatory report, and recognised by the Court in its Opinion,[18] the clear intention of the drafters of the text to make express reference to "the doctrine of the margin of appreciation as developed by the Court in its case-law."

3.2. Criteria for office of a judge – Article 21 of the Convention: Article 2 of the amending Protocol

9. The redrafting of Articles 21 and 23 of the Convention has been deemed necessary in order to remove the obligation on judges who reach the age of 70 to retire, in some cases before serving the full nine-year term in office. Instead, the new text provides a requirement that candidates be below the age of 65 on the date by which the list of three candidates is to be received by the Assembly, thereby in effect extending the age limit to 74. This proposal can be welcomed, especially as, since the entry into force of Protocol No. 14, judges are elected by the Assembly for a non-renewable period of nine years. Also, as recognised in the Court's recent opinion, this change will provide for the possibility of highly qualified persons, within the age bracket of 61 to 65, to put forward their candidature to serve on the Court for a full nine-year term of office. This change will, as specified in Article 8, paragraph 1, of the draft protocol, apply only to judges elected from lists of candidates submitted to the Assembly after the entry into force of Protocol No. 15.

10. During discussions within the Committee of Experts on the Reform of the Court, a subsidiary body of the CDDH,[19] experts accepted the need to refer to a specific date that would be known from the outset of the national selection procedure, with respect to this change of age limit. As explained in paragraph 13 of the draft protocol's explanatory report: "The process leading to election of a judge, from the domestic selection procedure to the vote by the Parliamentary Assembly, is long. It has therefore been considered necessary to foresee a date sufficiently certain at which the age of 65 must be determined, to avoid a candidate being prevented from taking office for having reached the age limit during the course of the procedure. For this practical reason, the text of the Protocol departs from the exact wording of the Brighton Declaration, whilst pursuing the same end. It was thus decided that the age of the candidate should be determined at the date by which the list of three candidates has been requested by the Parliamentary Assembly."

11. Although not directly pertinent in the context of the present text, I cannot resist the "temptation" to refer back to a report I prepared in 2009: the text of the Convention provides no indication as to a possible minimum starting age for a judge elected onto the Court. Instead of imposing a minimum age for the post of judge, which may not in itself be a firm indicator of judicial capacity, one rule that ought, perhaps, be envisaged, is the imposition of a twelve to fifteen years requirement of relevant work experience. In my view this matter merits further reflection in the light of the existence, in a number of member States, of a minimum age (and professional experience) requirement for eligibility to high judicial office.[20]

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17. The concept of a (national) margin of appreciation can be understood as a practice of allowing States' discretion in the manner in which they fulfil their Convention obligations with respect to, for example, Articles 8 to 12 of the Convention. This is a clear expression of the fact that the Convention does not command or even aspire to strict uniformity of human rights standards in Europe. For an excellent survey of this judge-made doctrine, consult the contributions to a seminar on this subject published in the *Human Rights Law Journal*, Vol. 19 (1998), pp.1-36.
18. See Appendix, paragraph 4.
19. For details see footnote 6 above.
20. See Doc. 11767, "Nomination of candidates and election of judges to the European Court of Human Rights", especially paragraphs 5 and 32.

3.3. Relinquishment of jurisdiction to the Grand Chamber – Article 30 of the Convention: Article 3 of the amending Protocol

12. This change, to amend Article 30 of the Convention so as to remove the possibility of Parties objecting to the relinquishment of a case by a Chamber in favour of the Grand Chamber, has been included upon the specific request of the Court in order to enhance the consistency of the Court's case-law.[21] This procedure will expedite the examination of important cases by removing one procedural step, and the Court has indicated that its Rules of Court are to be amended so that such relinquishment will be automatic when a Chamber envisages departing from settled case-law. This change will not apply to pending cases in which one of the Parties had already objected before entry into force of the Protocol.

13. This proposal does not necessitate any specific comments. Those involved in proceedings before the Court can take note of additional explanations provided by the Court in its Opinion, the text of which is appended to this report.

3.4. Admissibility criterion: time limit for submitting applications – Article 35, paragraph 1, of the Convention: Article 4 of the amending Protocol

14. Again, upon the Court's suggestion,[22] it has been decided to shorten, from six to four months, the time limit within which an application can be brought before the Court after all domestic remedies have been exhausted, as stipulated in Article 35, paragraph 1, of the Convention. The explanation given for this change – which seems to have been accepted without substantial objections – is that the development of swifter communications technology, along with time limits of similar length in existence in member States, argue for the reduction of the time limit. This change will take effect six months after the Protocol's entry into force in order to permit potential applicants to become fully aware of the new deadline.

3.5. Admissibility criterion: significant disadvantage – Article 35, paragraph 1, of the Convention: Article 5 of the amending Protocol

15. The present admissibility requirement, in Article 35, paragraph 3.b of the Convention, which specifies "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" is to be deleted. In other words, the draft protocol removes one of the limits on the Court's powers to reject a case as trivial; at present the Court cannot dismiss a case on that basis if the complaint has not been duly considered by a domestic court.

16. This amendment is logical, in that, if need be, a case will be examined on the merits where this is deemed appropriate by the Court, but at the same time recognising the fact that the Court ought not concern itself unnecessarily with trivial matters (giving greater effect to the maxim *de minimis non curat praetor*). This change will take effect upon the Protocol's entry into force and is to apply to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.

4. The Protocol's entry into force

17. As Protocol No. 15 is an amending protocol, it must be ratified by all the High Contracting Parties to the Convention for it to enter into force. Due to the fact that the proposed changes to the text are principally of a technical and uncontroversial nature, I suggest that the Assembly urge all the Parties to the Convention, and in particular their legislative bodies, to ensure this instrument's rapid signature and ratification.

21. See paragraph 38 of the Court's preliminary Opinion, of 20 February 2012, in preparation for the Brighton Conference: www.coe.int/t/dgi/brighton-conference/Documents/Court-Preliminary-opinion_en.pdf.
22. Ibid., paragraph 27.

Appendix – Opinion of the European Court of Human Rights on draft Protocol No. 15 to the European Convention on Human Rights[23]

Introductory remark

1. The Court issues this Opinion at the request of the Committee of Ministers of 17 January 2013.

2. Draft Protocol No. 15 was prepared in order to implement the decisions reached at the Brighton Conference to make five amendments to the European Convention on Human Rights. Three of these were suggested by the Court, in its Preliminary Opinion for the preparation of the conference, namely the repeal of the compulsory retirement age (Article 23 § 2), the removal of the parties' veto over the relinquishment of a case to the Grand Chamber (Article 30), and the reduction of the time limit for making an application from six months to four months (Article 35 § 1). These three matters are therefore only very briefly commented on below.

Remarks on the text

The Preamble

3. This part of the Protocol gives rise to two remarks. First, the reference in the second paragraph to the Brighton declaration makes clear the context within which the draft Protocol was negotiated. Second, the Court welcomes the wording of the fourth paragraph which, as did a very similar paragraph in the preamble to Protocol No. 14, affirms the pre-eminent role of the Court in protecting human rights in Europe. It is a statement very much in keeping with the declarations of all three high-level reform conferences, those of Interlaken, Izmir and Brighton.

Article 1

4. This provision contains a new paragraph intended to become the final recital in the Preamble to the Convention. This same wording was the subject of a comment that the Court sent to the CDDH in November 2012, in which it expressed reservations at the proposal. The Court's principal concern was that the phrasing used, which it found to be incomplete, could give rise to uncertainty as to its intended meaning. While the text has not been revised, the drafters' intentions have been clarified. The explanatory report now States that "[i]t is intended … to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law". That stated intention coincides with the suggestion that the Court made at the end of its comment to develop the text further. The intended meaning can therefore be said to be in line with the relevant terms of the Brighton Declaration (in particular paragraph 12b, read along with paragraphs 10, 11 and 12a). As the Court indicated in its comment to the CDDH, there clearly was no common intention of the High Contracting Parties to alter either the substance of the Convention or its system of international, collective enforcement. Although the Court's preference is still for a more developed text, it is aware that the current wording represents a compromise among States in order to reach agreement over the Protocol as a whole. In any event, both the explanation given and the context in which the text was drafted are themselves legally significant, as illustrated by the Court's references to the Explanatory Report to Protocol No. 14 and to the Interlaken Action Plan in *Korolev v. Russia* (dec.), No. 25551/05, ECHR 2010. Moreover, the report of the relevant meeting of the CDDH – an extract of which the Committee of Ministers appended to its request for the present opinion – forms part of the travaux préparatoires of the Protocol and thus is relevant to its interpretation.

5. The other principle that is referred to in the proposed new paragraph is subsidiarity. This having been a fundamental theme of the reform of the process, the insertion of a reference to it in the Convention is to be welcomed. The wording used in this respect, and in the explanatory report, reflects the Court's pronouncements on the principle.

Article 2

6. The Court welcomes this change, which should be beneficial in future by fostering the election of very highly experienced candidates as judges, whose services may be retained beyond an age limit that no longer seems imperative in the present day.

23. Adopted by the Court on 6 February 2013, and transmitted by the Chairperson of the Ministers' Deputies to the President of the Parliamentary Assembly on 12 February 2013.

Article 3

7. This change, which was proposed by the Court as a means of enhancing case-law consistency, is also welcomed. The explanatory report identifies an additional reason for this amendment, namely expediting the examination of important cases by removing one procedural step.

8. The first point the Court would make is that, as indicated in its preliminary opinion for the Brighton Conference, it has modified Rule 72 of the Rules of Court concerning relinquishment of jurisdiction.

9. The explanatory report then raises three points, in paragraphs 18 and 19, regarding the Court's practice once this amendment takes effect. The first is that before deciding to relinquish a case, the Chamber consult the parties. This can be accommodated.

10. The second point is that the Chamber narrow down the case in question by rejecting any inadmissible complaints at that stage. The Court's practice at present, at both Chamber and Grand Chamber level, is to consider issues of admissibility and merits simultaneously, as envisaged by Article 29 § 1 of the Convention. It is of course open to a Chamber to dispose of part of an application by means of an admissibility decision and then to relinquish jurisdiction in favour of the Grand Chamber – see as a recent example *Catan and Others v. the Republic of Moldova and Russia*.[24] It is relevant to point out here that, subsequent to the drafting of the explanatory report, the Court has amended Rule 27A of the Rules of Court. It is now possible for Presidents of Section, when communicating a case to the Government, to simultaneously strike out any manifestly ill-founded or plainly inadmissible complaints from a file. This will be in the interests of a more focussed procedure before the Chamber and, in case of relinquishment, before the Grand Chamber.

11. The third point is that the Court give more specific indications to the parties regarding the possible change in case-law that might occur, or the serious question of interpretation that has prompted relinquishment. It is in the interests of the procedure that it be clear to the parties what issues they should address in depth before the Grand Chamber. In most cases, these issues should be clear enough. Where a party has a doubt, it may raise the matter with the Court's Registry, which can provide assistance.

Article 4

12. Regarding the reduction of the time-limit, the Court has no remark. It notes the transitional rules that accompany this amendment, which provide a valuable measure of legal certainty to applicants. It will ensure that the public is notified in a clear and timely way of the entry into force of this amendment, and looks to Governments, national human rights institutions, the legal profession and civil society to assist it in this.

Article 5

13. Concerning this final amendment, the Court sees no difficulty.

24. Applications Nos. 43370/04, 8252/05 and 18454/06. By a decision of 15 June 2010 the Chamber found part of the application inadmissible. It subsequently relinquished jurisdiction in favour of the Grand Chamber, which gave judgment on 19 October 2012. See also *Scoppola v. Italy (No. 2)* [GC], No. 10249/03, 17 September 2009.