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

Request for an opinion

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Letter from the Chair of the Ministers' Deputies to the President of the Parliamentary Assembly of 17 January 2013

At their 1159th meeting (16 January 2013), the Ministers' Deputies decided to transmit to the Parliamentary Assembly, for opinion, draft Protocol no. 15 to the European Convention on Human Rights prepared by the Steering Committee for Human Rights (CDDH) as part of the follow-up to the Brighton declaration.

Accordingly, I have the honour of sending you the enclosed draft protocol, together with the related draft explanatory report for information purposes.

I additionally enclose, also for information, an excerpt from the report of the CDDH meeting at which the draft protocol was adopted by consensus.

Finally, I inform you that the Ministers' Deputies also decided to submit the draft Protocol to the European Court of Human Rights for opinion, which I will send you as soon as it is available, so that the Parliamentary Assembly can familiarise itself with it.

I look forward to receiving the Assembly's opinion.

Yours sincerely,

[signature]

Mr Josep Dallères

Chair of the Ministers' Deputies

Extract of the report of the 76th meeting of the Steering Committee for Human Rights (CDDH) (Strasbourg, 27-30 November 2012)

Draft Protocol No. 15

9. Concerning draft Protocol no. 15 and the Explanatory Report thereto, the CDDH gave full consideration to the letter of 23 November 2012 sent by the President of the Court to the CDDH Chairman concerning draft Article 1 of the Protocol. It recalled that the Court had participated in all stages of preparation of the draft text, in accordance with the terms of reference. On this basis, and in the light also of further clarifications provided by Mr John DARCY of the Registry, it carefully re-examined the compromise text presented by the DH-GDR. It decided, in the light of the views expressed by the Court, to clarify in the Explanatory Report that the intention was "to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case-law". Accordingly, the CDDH decided not to amend Article 1 of the Protocol. A written proposal to replace the text of the draft Article 1 with a version containing three paragraphs did not receive support. On this basis and following examination of all other parts of the two texts, the CDDH adopted draft Protocol no. 15 and the Explanatory Report thereto by consensus as they appear in Addenda III and IV respectively.

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

Preamble

The member States of the Council of Europe and the other High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), signatory hereto,

Having regard to the declaration adopted at the High Level Conference on the Future of the European Court of Human Rights, held in Brighton on 19 and 20 April 2012, as well as the declarations adopted at the conferences held in Interlaken on 18 and 19 February 2010 and İzmir on 26 and 27 April 2011;

Having regard to Opinion No. … (20…) adopted by the Parliamentary Assembly of the Council of Europe on …;

Considering the need to ensure that the European Court of Human Rights (hereinafter referred to as "the Court") can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

Article 1

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

> *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,".*

Article 2

1. In Article 21 of the Convention, a new paragraph 2 shall be inserted, which shall read as follows:

> *"Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22."*

2. Paragraphs 2 and 3 of Article 21 of the Convention shall become paragraphs 3 and 4 of Article 21 respectively.

3. Paragraph 2 of Article 23 of the Convention shall be deleted. Paragraphs 3 and 4 of Article 23 shall become paragraphs 2 and 3 of Article 23 respectively.

Article 3

In Article 30 of the Convention, the words "unless one of the parties to the case objects" shall be deleted.

Article 4

In Article 35, paragraph 1 of the Convention, the words “within a period of six months” shall be replaced by the words “within a period of four months”.

Article 5

In Article 35, paragraph 3, sub-paragraph *b* of the Convention, the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted.

Final and transitional provisions

Article 6

1. This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 6.

Article 8

1. The amendments introduced by Article 2 of this Protocol shall apply only to candidates on lists submitted to the Parliamentary Assembly by the High Contracting Parties under Article 22 of the Convention after the entry into force of this Protocol.

2. The amendment introduced by Article 3 of this Protocol shall not apply to any pending case in which one of the parties has objected, prior to the date of entry into force of this Protocol, to a proposal by a Chamber of the Court to relinquish jurisdiction in favour of the Grand Chamber.

3. Article 4 of this Protocol shall enter into force following the expiration of a period of six months after the date of entry into force of this Protocol. Article 4 of this Protocol shall not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of Article 4 of this Protocol.

4. All other provisions of this Protocol shall apply from its date of entry into force, in accordance with the provisions of Article 7.

Article 9

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. the date of entry into force of this Protocol in accordance with Article 7; and

d. any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this … day of… …, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other High Contracting Parties to the Convention.

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

I. Introduction

1. The High-level Conference on the Future of the European Court of Human Rights, organised by the Swiss Chairmanship of the Committee of Ministers, took place in Interlaken, Switzerland, on 18-19 February 2010. The Conference adopted an Action Plan and invited the Committee of Ministers to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention. On 26-27 April 2011, a second High-level Conference on the Future of the Court was organised by the Turkish Chairmanship of the Committee of Ministers at Izmir, Turkey. This Conference adopted a follow-up plan to review and further the reform process.

2. In the context of work on follow-up to these two Conferences, the Ministers' Deputies gave renewed terms of reference to the Steering Committee for Human Rights (CDDH) and its subordinate bodies for the biennium 2012-2013. These required the CDDH, through its Committee of experts on the reform of the Court (DH-GDR), to prepare a draft report for the Committee of Ministers containing specific proposals requiring amendment of the Convention.

3. Alongside this report, the CDDH presented a Contribution to the High-level Conference on the future of the Court, organised by the United Kingdom Chairmanship of the Committee of Ministers at Brighton, United Kingdom, on 19-20 April 2012. The Court also presented a Preliminary Opinion in preparation for the Brighton Conference containing a number of specific proposals.

4. In order to give effect to certain provisions of the Declaration adopted at the Brighton Conference, the Committee of Ministers subsequently instructed the CDDH to prepare a draft amending protocol to the Convention.[1] This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the DH-GDR, following which the draft was further examined and adopted by the CDDH at its 76th meeting (27-30 November 2012) for submission to the Committee of Ministers.

5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. … on the draft protocol on … … 20….

6. At its … meeting, the [Committee of Ministers] / [Ministers' Deputies] examined and decided to adopt the draft as Protocol No. 15 to the Convention (CETS …). At the same time, it took note of the present Explanatory Report to Protocol No. 15.

II. Comments on the provisions of the Protocol

Article 1 of the amending Protocol

Preamble

7. A new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law. In making this proposal, the Brighton Declaration also recalled the High Contracting Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention.[2]

8. 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.

9. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights

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1. Namely those set out in paragraphs 12b, 15a, 15c, 25d and 25f of the Declaration. See the decisions of the 122nd Session of the Committee of Ministers (23 May 2012), item 2 – Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights.
2. See in particular paragraphs 12.b., 3 and 11 of the Brighton Declaration.

at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Entry into force/ application

10. In accordance with Article 8, paragraph 4 of the Protocol, no transitional provision relates to this modification, which will enter into force in accordance with Article 7 of the Protocol.

Article 2 of the amending Protocol

Article 21 – Criteria for office

11. A new paragraph 2 is introduced in order to require that candidates be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly further to its role in electing judges under Article 22 of the Convention.

12. This modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the membership of the Court. The age limit applied under Article 23, paragraph 2 of the Convention, as drafted prior to the entry into force of this Protocol, had the effect of preventing certain experienced judges from completing their term of office. It was considered no longer essential to impose an age limit, given the fact that judges' terms of office are no longer renewable.

13. 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. In this connection, it would be useful if the State Party's call for applications were to refer to the relevant date and if the Parliamentary Assembly were to offer a means by which this date could be publicly verified, whether by publishing its letter or otherwise.

14. Paragraph 2 of Article 23 has been deleted as it has been superseded by the changes made to Article 21.

Entry into force/ application

15. In order to take account of the length of the domestic procedure for the selection of candidates for the post of judge at the Court, Article 8, paragraph 1 of the Protocol foresees that these changes will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly by High Contracting Parties under Article 22 of the Convention after the entry into force of the Protocol. Candidates appearing on previously submitted lists, by extension including judges in office and judges-elect at the date of entry into force of the Protocol, will continue to be subject to the rule applying before the entry into force of the present Protocol, namely the expiry of their term of office when they reach the age of 70.

Article 3 of the amending Protocol

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

16. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law.[3] Removal of the parties' right to object to relinquishment will reinforce this development.

17. The removal of this right would also aim at accelerating proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto or a potential departure from existing case-law.

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3. See paragraph 16 of the Preliminary Opinion of the Court in preparation for the Brighton Conference.

18. In this connection, it would be expected that the Chamber will consult the parties on its intentions and it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.

19. This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto.

Entry into force/ application

20. A transitional provision is foreseen in Article 8, paragraph 2 of the Protocol. Out of concern for legal certainty and procedural foreseeability, it was considered necessary to specify that removal of the parties' right to object to relinquishment would not apply to pending cases in which one of the parties had already objected, before entry into force of the Protocol, to a Chamber's proposal of relinquishment in favour of the Grand Chamber.

Article 4 of the amending Protocol

Article 35, paragraph 1 – Admissibility criteria: time limit for submitting applications

21. Both Articles 4 and 5 of the Protocol amend Article 35 of the Convention. Paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final domestic decision within which an application must be made to the Court. The development of swifter communications technology, along with the time limits of similar length in force in the member States, argue for the reduction of the time limit.

Entry into force/ application

22. A transitional provision appears at Article 8, paragraph 3 of the Protocol. It was considered that the reduction in the time limit for submitting an application to the Court should apply only after a period of six months following the entry into force of the Protocol, in order to allow potential applicants to become fully aware of the new deadline. Furthermore, the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 that it does not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of the new rule.

Article 5 of the amending Protocol

Article 35, paragraph 1 – Admissibility criteria: significant disadvantage

23. Article 35, paragraph 3.b of the Convention, containing the admissibility criterion concerning "significant disadvantage", has been amended to delete the proviso that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give greater effect to the maxim *de minimis non curat praetor*.[4]

Entry into force/ application

24. As regards the change introduced concerning the admissibility criterion of "significant disadvantage", no transitional provision is foreseen. In accordance with Article 8, paragraph 4 of the Protocol, this change will apply as of the entry into force of the Protocol, in order not to delay the impact of the expected enhancement of the effectiveness of the system. It will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.

4. In other words, a court is not concerned by trivial matters.

Final and transitional provisions

Article 6 of the amending Protocol

25. This article is one of the standard final clauses included in treaties prepared within the Council of Europe. This Protocol does not contain any provision on reservations. By its very nature, this amending Protocol excludes the making of reservations.

Article 7 of the amending Protocol

26. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

Article 8 of the amending Protocol

27. Paragraphs 1 to 4 of Article 8 of the Protocol contain transitional provisions governing the application of certain other, substantive provisions. The explanation of these transitional provisions appears above, in connection with the relevant substantive provisions.

28. Article 8, paragraph 4 establishes that all other provisions of the Protocol shall enter into force as of the date of entry into force of the Protocol, in accordance with its Article 7.

Article 9 of the amending Protocol

29. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.