

PROTOCOL NO. 16 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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Introduction

The European Court of Human Rights was created under the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms is a multilateral international agreement concluded under the aegis of the Council of Europe. The European Court of Human Rights is the oldest international court in the field of the protection of human rights. The Convention was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953. The importance of the Convention lies not only in the scope of the fundamental rights it protects, but also in the protection mechanism established in Strasbourg to examine alleged violations and ensure compliance by the States with their undertakings under the Convention. Accordingly, in 1959, the European Court of Human Rights was set up.¹

All the members of the Council of Europe are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention gave effect to certain rights stated in the Universal Declaration of Human Rights and established an international judicial organ with jurisdiction to find against States that do not fulfil their undertakings.² At present, 47 European States are members of the Council of Europe, including the 28 Member States of the European Union. States that have ratified the Convention, have undertaken to secure and guarantee to everyone within their jurisdiction, not only their nationals, the fundamental civil and political rights defined in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is supplemented by a series of 14 protocols. Reforms of the European Convention on Human Rights and to the European Court of Human Rights are imprinted upon their respective histories. In recent years, the trend of steady, incremental reforms has given way to a near-constant cycle of reflections and reforms

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¹ <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

² http://echr.coe.int/Documents/50Questions_ENG.pdf.



initiatives, driven by the agendas of the High Level meetings at Interlaken (2010), Izmir (2011) and Brighton (2012).³

As a result of the job two additional protocols are open for signature and are not yet in force. These are Protocol No. 15⁴ amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the European Convention on Human Rights in relatively minor respects, and Protocol No. 16, that contains a number of procedural amendments to further improve the efficacy of the procedure before the Court, as well as a codification of the margin of appreciation doctrine and the subsidiarity principle.⁵

Both protocols are part of the European Convention for the Protection of Human Rights system reform efforts, in view of realizing an effective implementation of the European Convention for the Protection of Human Rights and ensuring viability of the European Convention for the Protection of Human Rights mechanism. In this paper the author will present the 16th Additional Protocol⁶ and the advisory procedure. The Additional Protocol will come into force on 1 August 2018, since 10 states have already ratified the Protocol so far.⁷

The New Protocol and the History

Several years ago, on 2 October 2013, the Committee of Ministers of the Council of Europe opened the Protocol No. 16 to the European Convention on Human Rights for signature. This new Protocol creates the possibility for supreme courts of the Contracting States to the Convention to request an advisory opinion from the European Convention of Human Rights on questions of principles relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

20 Member States have already signed the new Protocol and 10 Member States have ratified it,⁸ and will enter into force on 1 August 2018. The introduction of a new legal instrument is meant to strengthen implementation of the European Convention of Human Rights. The willingness of highest courts to exercise their right to request advisory opinions, and their choices of subject-matter, may offer genuine scope for the

³ Noreen, O'Meara: Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR, *iCourts Working Paper Series*, No. 31, 2015. 4.

⁴ Hungary signed that in November 2015.

⁵ Janneke, Gerards, Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights – A Comparative and Critical Appraisal. *Maastricht Journal of European and Comparative Law*, Vol. 21 (2014) Issue 4, 632.

⁶ The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 285 (2013) on the draft protocol on 28 June 2013. At their 1176th meeting, the Ministers' Deputies examined and decided to adopt the draft as Protocol No. 16 to the ECHR.

⁷ https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=XHiY51TQ.

⁸ Ibid. Hungary neither ratified, nor signed the Protocol so far (May 2018).

Convention for the Protection of Human Rights and Fundamental Freedoms to deliver substantively valuable advisory opinions and highlight perceived problems at national levels.⁹

Paragraph 1 of Article 1 sets out key parameters of the new procedure: first, by stating that relevant courts or tribunals “may” request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal may withdraw its request.¹⁰

The Advisory Opinions Procedure of Protocol No. 16.

The Protocol No. 16 has only 11 Articles. On the basis of the Protocol the highest national courts (and only the highest courts) may request the European Court of Human Rights to give advisory opinions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.¹¹ The advisory opinions procedure entails that the competent national courts may present questions regarding the interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms. The advisory opinions procedure must relate to a concrete case presented to the national court. The national court must relate to a concrete case presented.

National courts must supply the European Court of Human Rights with information about the relevant legal and factual backgrounds of the case that has given rise to questions of interpretation of the Convention. The European Court of Human Rights is not obliged to accept a request for an advisory opinion. Paragraph 3 of Article 1 sets out certain procedural requirements that must be met by the requesting court or tribunal. They reflect the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it. These requirements serve two purposes: i) *first*, they imply that the requesting court or tribunal must have reflected upon the necessity and utility of requesting an advisory opinion of the Court, so as to be able to explain its reasons for doing so; ii) *second*, they imply that the requesting court or tribunal is in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto.¹²

⁹ Noreen: *op. cit.* 25.

¹⁰ See http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

¹¹ Article 1 of the Protocol.

¹² Protocol No. 16, *Explanatory Report* (CETS No. 214),

http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

If the Court accepts a request, the Grand Chamber will deliver the advisory opinion. A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.¹³ The President of the European Court of Human Rights may invite other states or persons to submit written comments or take part in any hearing (Article 3).

If the advisory opinions to be delivered by the Court are reasoned in this case, then they will be published. Reasons shall be given for advisory opinions (Article 4). The judge can give separate opinion. Advisory opinions will not be binding for the requesting national court.¹⁴ The non-binding character of advisory opinions is a more complex factor that carries both benefits and risks associated with the reinforcement of dialogue between national courts and tribunals and for the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁵ According to the Article 6 acceptance of the No. 16 Protocol is optional for High Contracting Parties to the Convention.

The role of national courts is determining. The requesting national court is obliged to give information about the following questions during the advisory opinion procedure. It has to summarize the national procedure highlighting the subject of the domestic case and the conclusions concerning the facts (possibly comprehensive report), and has to review the relevant national laws. The national court has to refer to the provisions (rights and freedoms) of the European Convention of Human Rights that are requested to be interpreted. If necessary the member state court shall present the summary of the argumentation of the parties as well, moreover the requesting court can state its own opinion about the analysis of the question. The official language of the procedure of the European Convention of Human Rights is English or French, but by request domestic language is applicable.

The Court of Justice of the European Union and the Opinion

The fundamental rights form an integral part of the general principles of the European Union law. For that purpose, the Court of Justice of the EU draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms has been on the agenda of the European Union for long. After the European Union accession to the European Convention of Human Rights and Fundamental

¹³ See Article 2.

¹⁴ See Article 5.

¹⁵ Noreen: *op. cit.* 27.

Freedoms will become part of European Union law. By an Opinion given in 1996,¹⁶ the Court of Justice had then concluded that, as European Community law stood at the time, the European Community had no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Four years later, the European Parliament, the Council of the European Union and the Commission have, in 2000, proclaimed the Charter of Fundamental Rights of the European Union, which has been given the same legal value as the Treaties by the Treaty of Lisbon, which entered into force on 1 December 2009. The European Union prepared one draft agreement because – in accordance with Treaty of Lisbon – the European Union must be connected the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷

The draft agreement must be compatible with the Treaties. In 2013 the European Commission submitted a request pursuant to Article 218 (11) of the Treaty on the Functioning of the European Union for an Opinion of the Court of Justice on whether the draft Accession Agreement is compatible with the EU Treaties. The Court of Justice of the European Union examined this question and one year ago, on the 18 December 2014, the European Court gave an opinion (hereinafter: Opinion).¹⁸ The Court of Justice took an extremely protective approach in Opinion 2/13 while interpreting the role of the preliminary rulings procedure in the light of Protocol No. 16 of the European Convention of Human Rights. Evidently, the Court of Justice connected the possible effects of Protocol No. 16 with two fundamental theoretical issues: i) the importance of the preliminary reference procedure as an integral part of the EU judicial system and ii) its role in the protection of the primacy of EU law within the EU legal order.¹⁹ This opinion scrutinizes the draft document concerning accession. The Opinion of the Court of Justice of the European Union investigated several questions, e.g. the compatibility of the agreement with EU primary law, the specific

¹⁶ Opinion 2/94 of the Court of Justice (ECR 1996 I-01759).

<http://curia.europa.eu/juris/showPdf.jsf?sessionid=9ea7d0f130d5b2518e8e56c641df87ecd2d91d5e75a3.e34KaxiLc3eQc40LaxqMbN4Oa3eSe0?text=&docid=99493&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=86692>.

¹⁷ Treaty of Lisbon, Article 6 „2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

¹⁸ Opinion 2/13. (full court).

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=572096>. See also, Mohay, Ágoston: Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note, *Pécs Journal of International and European Law*, 2015/1. 28-36.

¹⁹ Daminova, Nasiya: Protocol No. 16 of the ECHR in CJEU Opinion 2/13: Analysis and perspectives, <https://blogs.uta.fi/ecthrworkshop/2016/02/29/daminova/>.

characteristics and autonomy of European law and Protocol No. 16. The Court of Justice of the European Union concludes that the draft agreement on the accession of the European Union to the European Convention on Human Rights is not compatible with European Union law.

The material scope of Protocol No. 16 is clearly confined to the Convention and its protocols, but some concerns have been expressed in the recent past, e.g. the Protocol No. 16 would not threaten the autonomy of European Union law and the monopoly of the Court of Justice of the European Union on the interpretation of European Union law, by allowing supreme courts of the Member States to engage in a kind of “forum shopping” between the Court of Justice of the European Union and The European Court of Human Rights.

First of all, it should be noted that the scope of Protocol No. 16 is not limited to the European Union and its Member States but rather covers all Contracting States to the European Convention on Human Rights, of which the European Union Member States form only a part.

Summary and Concluding Remarks

The Lisbon Treaty introduced some major changes to the nature of fundamental rights protection in the European Union, which affect the nature of its relationship with the European Convention on Human Rights. Article 6 of the Treaty on European Union, as amended, ensures the binding, primary law status of the Charter of Fundamental Rights, as well as creating a new legal basis for the European Union to accede to the European Court of Human Rights.²⁰

The request for an advisory opinion can be presented to the European Convention for the Protection of Human Rights exclusively by the highest court of the member state, in Hungary only by the Kúria. The dispute has to be judged by the highest court of the member state so the case supposed to be in stage of legal remedy. Protocol No. 16 constitutes a valuable starting point for a better understanding of human rights. Hungary has not signed the additional protocol, however, the new procedure - ensuring the protection of the fundamental rights - could be important and useful for the law enforcement bodies as well. This new procedure provides further possibility for national courts to get support in interpreting fundamental rights and freedoms; therefore this paper takes a stand with the ratification of the Protocol.

As long as Hungary ratifies the Protocol the author would recommend the creation of a working group of judges at the Supreme Court, namely at the Kúria to examine the advisory opinion procedure.

²⁰ Sionaidh, Douglas-Scott: The Court of Justice of the European Union and the European Court of Human Rights after Lisbon. In: de Vries, Sybe – Bernitz, Ulf – Weatherill, Stephen (eds.): *The Protection of Fundamental Rights in the EU After Lisbon*. Oxford and Portland, Oregon, 2013. 153.

Propositions to the Content of the Additional Protocol

In the scientific literature and with regard to the opinion stated by the Court of Justice in December 2013, it is a common point of view that the relation between advisory opinion and preliminary ruling is yet unclear. Nor the draft agreement examined by the Court of Justice dealt with their relation. This was because at the time the draft agreement got presented the additional protocol was still under reconciliation. A basic difference compared to the preliminary ruling is that in this case the legal dispute should be judged by the highest level court, since only that court is authorized to submit a petition for an advisory opinion. By stating that relevant courts or tribunals “may” request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal might pull back its request.²¹

In the preliminary ruling procedure judges pass a resolution by simple majority. The ruling does not show the name of judges who voted against it or who had given separate opinion, on the other hand in the advisory opinion procedure the judge with a different opinion can give a separate opinion to the resolution. It is also necessary to be examined that the petition for advisory opinion was submitted by an EU member state, and which judiciary level did the request come from. According to these restrictions the apprehension from the EU is not by all means so significant that the advisory opinion procedure would limit or substitute the preliminary ruling procedure. In the course of the review of the draft agreement it is necessary to ensure the autonomy of the preliminary ruling and the European Union legislation.

The European Court of Human Rights shall decide about the request in a reasonable time because the new procedure extends the duration of the basic case. Due to this it is very important for the national tribunal to submit a proper and complete petition. So that to avoid breaching the right for fair trial the European Convention for the Protection of Human Rights itself has to give the advisory opinion within a reasonable time. The author believes as the additional protocol getting into force the European Convention for the Protection of Human Rights will aim to lead a fair trial and deciding about the petitions within a reasonable time is an important element of this.

In the interest of the member states it is a guarantee rule to have the national judge of the requesting country in the panel of judges. The member state national judge has a more comprehensive knowledge about the given national law so this way the decision shall be more complex contributing to a proper advisory opinion considering the interpretation of fundamental rights and freedoms.

²¹ Beqiraj (Mihani), Pranverav – Çani (Methasani), Eralda: The Reform of the European Court of Human Rights – The Ongoing Process. *European Academic Research*, Vol. III (2015) Issue 4, 4650.

The optional character of Protocol No. 16 strengthens national authority by member states are not obliged to join it. The request for advisory opinion proceeding is optional in the respect that the national tribunal can withdraw its petition nor the content of the advisory opinion bound the requesting court so it is not obliged to include it into its own decision. The advisory opinion is not-binding for the national court; necessarily the national court is authorized to decide the action.

Technical Propositions to the Additional Protocol

It is necessary to assess the increase of the number of cases and the workload and in compliance with that the amendment of the procedural rules is necessary as well. It is the obligation and the responsibility of the national court to submit an appropriate and accurate request.

A detail concerning the procedure for advisory opinion has to be worked out for the procedural regulation. At the same time the workload of the Court of Justice has to be under examination whether the application for advisory opinion increases the caseload of the court and if this requires staff increase that may cause extra cost within the budget of the organization. The Court of Justice publishes every year a report describing its last year activity. Referring to the 2014 report the number of requests for preliminary ruling procedure was 428 and in averages a case last for about 15 months. This can give the European Convention for the Protection of Human Rights a starting point to estimate the caseload deriving from the establishment of the advisory opinion procedure. This of course depends on how many member states ratify the supplementary protocol. The number of applications for preliminary ruling procedures before the Court of Justice increased with a third since 2010.

The main topic of this kind of requests received in 2014 was the interpretation of legal matters concerning the territory of freedom, safety and enforcement of law. The estimation of the possible number of requests for advisory opinion procedure need to be made depending on the condition that the highest courts of the contracting states are exclusively entitled to apply for an advisory opinion. This measure has to be taken before establishing the new procedure to prepare the technical conditions for the European Convention for the Protection of Human Rights.

According to *Noreen O'Meara*, the future impact of Protocol No. 16, the objectives of the Protocol No. 16. are laudable, namely aiming to ultimately reduce the Court's incoming caseload, to offer a platform for reinforcing dialogue with national courts and to further embed the Convention through influencing the adjudication of contentious cases in European Court of Human Rights and at national level. This partnership and the concomitant dialogue between courts is thought to contribute to the improvement

of practicable fundamental rights standards and, thereby, to the effectiveness of fundamental rights protection on the national level.²²

The final goal of Protocol No. 16, as a continuation of previous reforms, is the reduction of the Court's excessive caseload. Advisory Opinions of the Court regarding the interpretation and application of the Convention will help to explain the provisions of the Convention and the case law of the Court, by giving further instructions to help States Parties to avoid violations in the future. In this respect, the reform of Protocol No.16 through the enhancement of the dialogue between The Court and the highest national courts or tribunals aims a better application of the Conventions at the domestic level. This is seen as an opportunity to reduce the workload of the Court.²³

According to *Ada Paprocka* and *Michał Ziółkowski*, the advisory opinions may become a useful instrument of dialogue between the Court and national authorities that would enhance the Convention's impact on national legal systems. They may also help to clarify the Strasbourg jurisprudence in certain areas or even to develop the case-law. Full assessment of their relevance and importance in the European Convention for the Protection of Human Rights and Fundamental Freedoms system will depend on the national courts' activity and the Strasbourg Court's goodwill in a multilevel human rights dialogue.²⁴ The questions mentioned above shall be cleared after 1 August 2018, when the Additional Protocol will enter into force.

²² Janneke: *op. cit.* 638.

²³ Beqiraj-Çani: *op. cit.* 4652.

²⁴ Paprocka, Ada – Ziółkowski, Michał: Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights. *European Constitutional Law Review*, Volume 11 (2015) Issue 2, 292.