Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 13167
23 April 2013

Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Request for an opinion
Committee of Ministers

Contents **Page**

1. Letter from the Chair of the Ministers' Deputies to the President of the Parliamentary Assembly of 11 April 2013 2
2. Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 3
3. Draft explanatory report to Protocol No. 16 to the European Convention on Human Rights - Explanatory Report 5
3.1. Introduction 5
3.2. Comments on the provisions of the Protocol 5

Letter from the Chair of the Ministers' Deputies to the President of the Parliamentary Assembly of 11 April 2013

At their 1168th meeting (10 April 2013), the Ministers' Deputies decided to transmit to the Parliamentary Assembly, for opinion, draft Protocol no. 16 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.

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 Dallerès

Chair of the Ministers' Deputies

Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Preamble

The member States of the Council of Europe and 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"), signatories hereto,

Having regard to the provisions of the Convention and, in particular, Article 19 establishing the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity;

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

Have agreed as follows:

Article 1

1. Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

Article 2

1. 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.

2. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.

3. The panel and the Grand Chamber, as referred to in the preceding paragraphs, shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

Article 3

The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.

Article 4

1. Reasons shall be given for advisory opinions.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains.

4. Advisory opinions shall be published.

Article 5

Advisory opinions shall not be binding.

Article 6

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7

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 8

1. 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 ten High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any High Contracting Party to the Convention which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Protocol in accordance with the provisions of Article 7.

Article 9

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 10

Each High Contracting Party to the Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner.

Article 11

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. any date of entry into force of this Protocol in accordance with Article 8;

d. any declaration made in accordance with Article 10; and

e. 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 xxx, this xxx, in English and 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 explanatory report to Protocol No. 16 to the European Convention on Human Rights - Explanatory Report

Introduction

1. The proposal to extend the jurisdiction of the European Court of Human Rights (the Court) to give advisory opinions was made in the report to the Committee of Ministers of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005) "to consider the issue of the long-term effectiveness of the ECHR control mechanism". The Group of Wise Persons concluded that "it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding." Such a new competence would be in addition to that accorded to the Court under Protocol No. 2 to the European Convention on Human Rights (the Convention), whose provisions are now principally reflected in Articles 47-49 of the Convention. The Group of Wise Persons' proposal was examined by the Steering Committee for Human Rights (CDDH) as part of its work on follow-up to the former's report.

2. The Izmir High-level Conference on the future of the Court (26-27 April 2011), in its final Declaration, subsequently "[invited] the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations". The Ministers' Deputies decisions on follow-up to the Izmir Conference then invited the CDDH to elaborate specific proposals, with options, for introducing such a procedure. The CDDH's Final Report to the Committee of Ministers on measures requiring amendment of the ECHR included an in-depth examination of a more detailed proposal made by the experts of The Netherlands and Norway, reflected also in its Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers.

3. The question of advisory opinions was discussed at length during the preparation of the subsequent Brighton High-level Conference on the future of the Court (19-20 April 2012), to which the Court contributed a detailed "Reflection Paper on the proposal to extend the Court's advisory jurisdiction". The final Declaration of the Brighton Conference, "[noting] that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties[, invited] the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it".

4. Following the Brighton Conference, the 122nd Session of the Committee of Ministers (23rd May 2012) instructed the CDDH to draft the required text. This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the plenary Committee of experts on the reform of the Court (DH-GDR), following which the draft was further examined and approved by the CDDH at its 77th meeting (22 March 2013) for submission to the Committee of Ministers. The key issues addressed during this process were: the nature of the domestic authority that may request an advisory opinion of the Court; the type of questions on which the Court may give an advisory opinion; the procedure for considering requests, for deliberating upon accepted requests and for issuing advisory opinions; and the legal effect of an advisory opinion on the different categories of subsequent case. The CDDH's position on these issues is reflected in the commentary on the Protocol's provisions in Section II below.

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. 16 to the Convention (CETS …). At the same time, it took note of the present Explanatory Report to Protocol No. 16.

Comments on the provisions of the Protocol

Article 1

7. Paragraph 1 of Article 1 sets out three 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.

8. Second, it defines the domestic authority that may request an advisory opinion of the Court as being the "highest courts or tribunals… as specified by [the High Contracting Party] under Article 10". This wording is intended to avoid potential complications by allowing a certain freedom of choice. "Highest court or tribunal" would refer to the courts and tribunals at the summit of the national judicial system. Use of the term "highest", as opposed to "the highest", permits the potential inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the 'highest' for a particular category of case. This, along with the requirement that a High Contracting Party specify which highest courts or tribunals may request an advisory opinion, allows the necessary flexibility to accommodate the particularities of national judicial systems. Limiting the choice to the 'highest' courts or tribunals is consistent with the idea of exhaustion of domestic remedies, although a 'highest' court need not be one to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35, paragraph 1 of the Convention. It should avoid a proliferation of requests and would reflect the appropriate level at which the dialogue should take place. It can be noted that under Article 10 (see further below), a High Contracting Party may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion. In some cases, the constitutional arrangements of a High Contracting Party may provide for particular courts or tribunals to hear cases from more than one territory. This may include territories to which the Convention does not apply and territories to which the High Contracting Party has extended the application of the Convention under Article 56. In such cases, when specifying a court or tribunal for the purposes of this Protocol, a High Contracting Party may specify that it excludes the application of the Protocol to some or all cases arising from such territories.

9. The third parameter concerns the nature of the questions on which a domestic court or tribunal may request the Court's advisory opinion. The definition – "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto" – is that which was used by the Group of Wise Persons and endorsed by the Court in its Reflection Paper, which was in turn inspired by Article 43, paragraph 2 of the Convention on referral to the Grand Chamber. It was felt that there were certain parallels between these two procedures, not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber (see Article 2, paragraph 2). That said, when applying the criteria, the different purposes of the procedure under this Protocol and that under Article 43, paragraph 2 of the Convention will have to be taken into account. Interpretation of the definition will be a matter for the Court when deciding whether to accept a request for an advisory opinion (see Article 2, paragraph 1).

10. Paragraph 2 of Article 1 requires the request for an advisory opinion to be made in the context of a case pending before the requesting court or tribunal. The procedure is not intended, for example, to allow for abstract review of legislation which is not to be applied in that pending case.

11. 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. 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. 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. In providing the relevant legal and factual background, the requesting court or tribunal should present the following:

– the subject matter of the domestic case and relevant findings of fact made during the domestic proceedings, or at least a summary of the relevant factual issues;

– the relevant domestic legal provisions;

– the relevant Convention issues, in particular the rights or freedoms at stake;

– if relevant, a summary of the arguments of the parties to the domestic proceedings on the question;

– iIf possible and appropriate, a statement of its own views on the question, including any analysis it may itself have made of the question.

13. The Court would be able to receive requests in languages other than English or French, as it does at present for individual applications. Requesting courts or tribunals may thus address the Court in the national official language used in the domestic proceedings.

Article 2

14. Paragraph 1 of Article 2 sets out the procedure for deciding whether or not a request for an advisory opinion is accepted. The Court has a discretion to accept a request or not, although it is to be expected that the Court would hesitate to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1. As is the case for requests for referral to the Grand Chamber under Article 43 of the Convention, the decision on acceptance is taken by a five-judge panel of the Grand Chamber.

15. Unlike the procedure under Article 43, however, the panel must give reasons for any refusal to accept a domestic court or tribunal's request for an advisory opinion. This is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto", which would provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests. The Court should inform the High Contracting Party concerned of the acceptance of any requests made by its courts or tribunals.

16. Paragraph 2 of Article 2 states that it is the Grand Chamber of the Court (as defined in Article 26 of the Convention – see further under Article 6 below) that shall deliver advisory opinions following acceptance of a request by a five-judge panel. This is appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under Article 43 of the Convention.

17. The prioritisation to be given to proceedings under this protocol would be a matter for the Court, as it is with respect to all other proceedings. That said, the nature of the question on which it would be appropriate for the Court to give its advisory opinion suggests that such proceedings would have high priority. This high priority applies at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in hearings (see Article 3 below), as well as the Court itself. Undue delay in the advisory opinion proceedings before the Court would also cause delay in proceedings in the case pending before the requesting court or tribunal and should therefore be avoided (see further under paragraph 23 below).

18. Paragraph 3 of Article 2 states that the panel and the Grand Chamber shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. It can be noted that this is also the case for the Grand Chamber when sitting in its full composition on a case brought before it under Articles 33 or 34 of the Convention (see Article 26, paragraph 4 of the Convention). Paragraph 3 also establishes a procedure for circumstances where there is no such judge, or that judge cannot sit. This procedure is intended to be identical to that established under Article 26, paragraph 4 of the Convention and to be based upon the same list.

Article 3

19. Article 3 gives to the Council of Europe Commissioner for Human Rights and to the High Contracting Party whose domestic court or tribunal has requested the advisory opinion the right to submit written comments to and take part in any hearing before the Grand Chamber in proceedings concerning that request. The intention is that the Commissioner have an equivalent right under the Protocol to participate in advisory opinion proceedings as s/he does under Article 36, paragraph 3) of the Convention to make a third party intervention in proceedings before a Chamber or the Grand Chamber. The wording used in the Protocol, although slightly different to that found in the Convention, is intended to have the same effect. Since advisory opinion proceedings would not be adversarial, neither would it be obligatory for the government to participate, although it would always retain the right to do so, in the same way as does a High Contracting Party in proceedings brought by one of its nationals against another High Contracting Party (see Article 36, paragraph1 of the Convention on third party interventions).

20. The President of the Court may invite any other High Contracting Party or person to submit written comments or take part in any hearing, where to do so is in the interest of the proper administration of justice. This mirrors the situation concerning third party interventions under Article 36, paragraph 2 of the Convention. It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings.

21. It will be for the Court to decide whether or not to hold a hearing on an accepted request for an advisory opinion.

Article 4

22. Paragraph 1 of Article 4 requires the Court to give reasons for advisory opinions delivered under this Protocol; paragraph 2 of Article 4 allows for judges of the Grand Chamber to deliver a separate (dissenting or concurring) opinion.

23. Paragraph 3 of Article 4 requires the Court to communicate advisory opinions to both the requesting court or tribunal and the High Contracting Party to which that court or tribunal pertains. It is expected that the advisory opinion would also be communicated to any other parties that have taken part in the proceedings in accordance with Article 3. It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court's official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations.

24. Paragraph 4 of Article 4 requires the publication of advisory opinions delivered under this Protocol. It is expected that this will be done by the Court in accordance with its practice in similar matters and with due respect to applicable confidentiality rules.

Article 5

25. Article 5 states that advisory opinions shall not be binding. They take place in the context of the judicial dialogue between the Court and domestic courts and tribunals. Accordingly, the requesting court decides on the effects of the advisory opinion in the domestic proceedings.

26. The fact that the Court has delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under Article 34 of the Convention, i.e. they could still bring the case before the Court. However, where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out.

27. Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.

Article 6

28. Article 6 reflects the fact that acceptance of the Protocol is optional for High Contracting Parties to the Convention. It thus does not have the effect of introducing new provisions into the Convention, whose text remains unchanged. Only between High Contracting Parties that choose to accept the Protocol do its provisions operate as additional Articles to the Convention, in which case its application is conditioned by all other relevant provisions of the Convention. It is understood that this, in conjunction with Article 58 of the Convention, would allow a High Contracting Party to denounce the Protocol without denouncing the Convention.

Article 7

29. Article 7 is based on one of the model final clauses approved by the Committee of Ministers and contains the provisions under which a High Contracting Party to the Convention may become bound by the Protocol.

Article 8

30. The text of Article 8 is taken from Article 7 of Protocol No. 9 to the Convention and is based on the model final clauses approved by the Committee of Ministers. The number of High Contracting Parties whose expression of consent to be bound is required for the Protocol to enter into force was set at ten.

Article 9

31. Article 9 specifies, as an exception to Article 57 of the Convention, that High Contracting Parties may not make a reservation in respect of the Protocol.

Article 10

32. Article 10 is based on a standard clause used in Council of Europe treaties. It is intended explicitly to allow High Contracting Parties to make declarations on material issues arising under the Protocol, in this case to specify which of their highest courts or tribunals will be able to request advisory opinions from the Court. It also allows for further declarations to be made at any time adding to or removing from the list of specified courts or tribunals. All such declarations are addressed to the Secretary General of the Council of Europe, as depository of multilateral agreements made within the organisation.

Article 11

33. Article 11 is one of the usual final clauses included in treaties prepared within the Council of Europe. Its paragraph d. refers to the procedure established under Article 10 of the Protocol for specifying which of a High Contacting Party's highest courts or tribunals may request advisory opinions from the Court (see paragraph 32 above).