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Draft Protocol No. 16 to 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

Draft Protocol No. 16 to the European Convention on Human Rights – an additional protocol that will enter into force only after 10 Parties to Convention have ratified it – provides for the possibility for States' highest courts to obtain, from the European Court of Human Rights, opinions on questions of principle relating to the interpretation or application of rights and freedoms defined in the Convention and its protocols.

The Committee on Legal Affairs and Human Rights supports the adoption of the text, as presently drafted. When in force, this text will strengthen the link between the Strasbourg Court and States' highest courts by creating a platform for judicial dialogue, facilitating the application of the Court's case law by national courts. It will also help shift, from *ex post* to *ex ante*, the resolution of questions of interpretation to the domestic forum, saving valuable Court resources, and will permit a speedier resolution of similar cases at the national level, thereby reinforcing the principle of subsidiarity.

1. Reference to committee: Doc. 13167, Reference 3957 of 26 April 2013.

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A. Draft opinion[2]

1. Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, "the Convention"), as submitted to the Parliamentary Assembly in April 2013,[3] provides for the possibility for the highest courts of High Contracting Parties to obtain, from the European Court of Human Rights ("the Court"), opinions on questions of principle relating to the interpretation or application of rights and freedoms defined in the Convention and its protocols.

2. This additional protocol to the Convention, which must be ratified by 10 High Contracting Parties to the Convention before it enters into force, is likely to:

2.1. strengthen the link between the Court and States' highest courts by creating a platform for judicial dialogue, thereby facilitating the application of the Court's case law by national courts;

2.2. help shift, from *ex post* to *ex ante*, the resolution of a number of questions of interpretation of the Convention's provisions in the domestic forum, saving – in the long run – the valuable resources of the Court; the speedier resolution of similar cases on the domestic plane will also reinforce the principle of subsidiarity.

3. The Assembly is therefore of the view that this Protocol, as presently drafted, should be adopted by the Committee of Ministers and opened for signature and ratification.

2. Draft opinion adopted unanimously by the committee on 27 May 2013.
3. Doc. 13167.

B. Explanatory memorandum by Mr Chope, rapporteur

1. Procedure

1. On 11 April 2013, the Committee of Ministers (Ministers' Deputies) invited the Parliamentary Assembly to provide it with an opinion on draft Protocol No. 16 to the European Convention on Human Rights (ETS No. 5, "the Convention").[4] This request for an opinion was referred to the Committee on Legal Affairs and Human Rights on 26 April 2013. The committee appointed me as rapporteur on 25 April, in anticipation of the decision taken on 26 April 2013.

2. The context

2. The Committee of Ministers' decision instructing the Steering Committee for Human Rights (CDDH) to prepare this draft additional protocol to the Convention was taken at ministerial level on 23 May 2012 in the context of the follow-up to discussions undertaken at three high-level conferences held in Interlaken (February 2010), Izmir (April 2011) and Brighton (April 2012).[5]

3. The final Declaration of the Brighton High-level Conference on the Future of the Court (19-20 April 2012) states:

> *"[The Conference] notes 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; invites 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."* [6]

4. Upon receipt of the Assembly's Opinion on this draft Protocol, as well as that of the European Court of Human Rights ("the Court"), which has just been forwarded to the Assembly and which I have appended to this explanatory memorandum, the Committee of Ministers will decide whether to adopt the said text and open it for signature and ratification by the High Contracting Parties to the Convention.

3. Draft Protocol No. 16 to the European Convention on Human Rights

3.1. The key provisions: an overview

5. Draft Protocol No. 16 to the Convention provides for the possibility for the highest courts of High Contracting Parties to obtain, from the European Court of Human Rights, opinions on questions of principle relating to the interpretation or application of rights and freedoms defined in the Convention and its protocols.The procedure proposed by this additional protocol, which will enter into force only after 10 High Contracting Parties to the Convention have ratified it, has nothing to do with Court's distinct function of providing the Committee of Ministers with advisory opinions, as stipulated in Articles 47 to 49 of the Convention.

6. Specifications, such as exactly which "highest courts and tribunals" "may" request advisory opinions, and the modalities to seize the Court (reasons for making a request, need to provide relevant legal and factual background with respect to a "pending case") are provided in Articles 1 and 10 of the Protocol and in the explanatory report to these provisions.[7] The Court has discretion whether to accept a request, and the procedure for so deciding is explained in Article 2; Article 4 requires the Court to give reasons for advisory

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4. Doc. 13167.
5. As was also the case in respect of draft Protocol No. 15 to the European Convention on Human Rights: see Assembly Opinion 283 (2013) and the committee's report upon which this opinion was based, Doc 13093.
6. Paragraph 12.*d*. Text available in background document "The future of the European Court of Human Rights and the Brighton Declaration", AS/Jur (2012) 42: http://assembly.coe.int/CommitteeDocs/2012/ajdoc42_2012.pdf. See also the Court's "Reflection Paper" on this subject, issued just before the Brighton Conference: www.coe.int/t/dgi/brighton-conference/Documents/Court-Advisory-opinions_en.pdf.
7. See Doc. 13167.

opinions and judges may deliver separate (dissenting or concurring) opinions. Article 5 specifies that advisory opinions are not binding; the Council of Europe's Human Rights Commissioner is provided with the right to intervene in proceedings (Article 3); and no reservations are permitted to the Protocol (Article 9).

7. The Protocol is thus intended to operate with the greatest possible flexibility: its entry into force does not require ratification by all Parties to the Convention; Parties to the Protocol may choose which domestic courts may request an opinion; the Court is free to decide which requests to accept, and its opinions are not binding on the requesting court (but see paragraph 11 below).

3.2. A few critical remarks

8. Apart from the rather puzzling omission of an explanation – in the explanatory report – as to why the Preamble refers to "member States of the Council of Europe and other High Contracting Parties to the Convention" (this is done, presumably, with European Union accession to the Convention in mind), I also find it somewhat inappropriate for the text not to expressly cater for the right of intervention, before the Court, of the Parties involved in the domestic "case pending" with respect to which the Court has been seized for opinion (even though such a possibility is likely to be foreseen in the Court's Rules – see, in this connection, the second sentence in Article 3, and paragraph 10 of the Court's Opinion, appended to this report). Also, the requirement of the Grand Chamber's panel of five judges to give reasons for any refusal to accept a request to provide an advisory opinion (Article 2, paragraph 1) and the explanation provided for this in paragraph 15 of the explanatory report are not convincing, bearing in mind the Court's heavy workload. This goes against the wishes of the Court: see paragraph 9. But I am sure that the Court will be able to satisfy this requirement in a suitable manner, without much ado. Finally, I am in full agreement with the concerns expressed by the Court in its Opinion relating to the possibility for the Court to receive requests in languages other than English or French: see paragraph 13 of the (draft) explanatory report to Protocol No. 16 and the Court's comments thereon (paragraph 14).

3.3. Advisory opinions: a platform for judicial dialogue

9. Despite the above-mentioned critical remarks, which do not detract from the essential merits of the draft Protocol, I propose that the Committee on Legal Affairs and Human Rights indicate to the plenary Assembly that it is by and large in favour of this text. This Protocol, as presently drafted, should be adopted by the Committee of Ministers and opened for signature and ratification. There are, in my view, two inter-related reasons for this. When this additional Protocol is ratified by 10 States, and advisory opinions are sought, this new procedure is likely to strengthen the link between the Court and States' highest courts by creating a platform for judicial dialogue, thereby facilitating the application of the Court's case law by national courts. It would also help shift, from *ex post* to *ex ante*, the resolution of a number of questions of interpretation and application of the Convention's provisions into the domestic forum, saving – in the long run – the valuable resources of the Court. The speedier resolution of similar cases on the domestic plane will also reinforce the principle of subsidiarity.

10. This new procedure will inevitably, at first, generate extra work for the already overburdened Court (although one can imagine that a case that gives rise to an advisory opinion may well otherwise have led to an individual application in Strasbourg). But it will, as indicated in the Court's "Reflection Paper",[8] potentially enable a more consistent interpretation and application of the Convention's standards by domestic judges. In other words, advisory opinions will enable, at State level, the resolution of a number of issues, thus preventing future repetitive applications to the Court. Such a procedure will not only enhance the legitimacy of the Court, but will also reinforce the application of the principle of subsidiarity.

11. As far as Article 5 of the additional Protocol is concerned, "Advisory opinions shall not be binding"; this provision must be read in conjunction with what is stated in paragraph 27 of the (draft) explanatory report, which specifies: "Advisory opinions … would … 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 decision." Hence, although advisory opinions will not have the binding character of Grand Chamber judgments in contentious cases, they would nevertheless have "undeniable legal effects".[9]

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8. See footnote 6, above, in particular paragraphs 30 and 31 which provide examples of the type of case in which requests for advisory opinions could be envisaged. See also comments of Michael O'Boyle, the Court's Deputy Registrar, in The Conscience of Europe – 50 years of the European Court of Human Rights (2010, Council of Europe/Third Millennium publishers), "Chapter 15 – The Future", pp. 190-201, at pp. 198-199.

Appendix – Opinion of the European Court of Human Rights on Draft Protocol No. 16 to the European Convention on Human Rights extending its competence to give advisory opinions on the interpretation of the Convention[10]

1. The Draft Protocol is the result of a lengthy process culminating in the Brighton Declaration which invited the Committee of Ministers to draft the text of an optional protocol by the end of 2013.

2. The Court recalls its earlier contribution to the discussion of this issue, which took the form of a reflection paper circulated to States and other interested parties in March 2012.[11] That paper reflected the diversity of views within the Court on the merits of the proposal. In the present opinion, the Court will confine itself to commenting on the model developed by the Steering Committee on Human Rights (CDDH).

3. The Court welcomes the fact that the drafters of the Protocol have taken account of points contained in the Court's reflection paper, which was in turn informed by the results of earlier inter-governmental discussions. The exercise thus provides a good example of a constructive exchange of ideas between States and the Court.

4. The Protocol's purpose of enabling a dialogue between the highest national courts and the European Court is well described in the third paragraph of the Preamble to the Protocol, which refers to enhanced interaction between the Court and national authorities, and to reinforced implementation of the Convention in accordance with the principle of subsidiarity. The Court fully subscribes to these aims.

5. The main elements of the new procedure are set out in five Articles.

6. Under Article 1 § 1 "highest courts and tribunals", as specified by the Contracting Party in accordance with Article 10, are authorised to seek an opinion. The explanatory report (paragraph 8) explains the reasoning behind this approach, namely limiting the number of courts empowered to avail themselves of the procedure, whilst leaving the Contracting Party a degree of flexibility to accommodate special features of its judicial system. The Court agrees with this line. Moreover, it notes the optional nature of the procedure, which is consistent with the view expressed in its reflection paper.

7. Article 1 § 2 provides that the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. Again this corresponds to what the Court advocated in its reflection paper, notably on the basis that there should not be an abstract review of legislation.

8. Article 1 § 3 stipulates that the requesting court should give reasons for its request and should provide the legal and factual background to the case. As regards the requirement of a reasoned request, it should not be for the Strasbourg Court to have to work out for itself in which respect the national court requires its opinion. For the procedure to function properly, the relevant issues of Convention law should be adequately identified and discussed at the national level. As regards the second requirement, the explanatory report (paragraph 11), correctly in the Court's view, stresses the need to allow the Court to focus on the question of principle brought before it. The Court should not be called upon to review the facts or the national law in the context of this procedure. Nor is it for the Court to decide the case pending before the requesting court.

9. Article 2 relates to the role of the Grand Chamber. The Court welcomes the fact that, under the terms of the draft, the Grand Chamber Panel will have discretion as to whether to accept a request. The draft Protocol would require the Court to give reasons for refusing a request. This goes against the opinion expressed by the Court in its reflection paper. The Court expressed a preference for issuing general guidelines on the scope and functioning of its advisory jurisdiction, rather than being obliged to give reasons for every refusal. The Court however accepts that it may be useful to give reasons. Such an approach would enhance the aim of creating a constructive dialogue with the national courts. The Court envisages that such reasons will normally not be extensive.

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9. As stressed by the Inter-American Court of Human Rights in respect of its advisory opinions: see Reports of the Inter-American Commission on Human Rights, Advisory Opinion OC-15/97, of 17 November 1997, Series A No. 15, paragraph 26, http://www1.umn.edu/humanrts/iachr/b_11_4o.html. See also background document "The future of the European Court of Human Rights and the Brighton Declaration", AS/Jur (2012) 42, paragraphs 17-22: http://assembly.coe.int/CommitteeDocs/2012/ajdoc42_2012.pdf.

10. Adopted by the plenary Court on 6 May 2013, and transmitted by the Chairperson of the Ministers' Deputies to the President of the Parliamentary Assembly on 15 May 2013.

11. "Reflection paper on the proposal to extend the Court's advisory jurisdiction", ref. no. 3853038. This document is available on the Court's website under the rubric "The Court/Reform of the Court/Reports and Notes".

10. Article 3 provides for the intervention of various parties in the proceedings, conferring a right to participate on the Government of the State of the requesting court and the Commissioner of Human Rights. Concerning the parties to the domestic proceedings, the Court would confirm the view expressed in the last sentence of paragraph 20 of the Explanatory Report that it would, as a matter of course, invite such parties to take part in the procedure before the Court. In this way the principle of equality would be respected. It would envisage providing for such an invitation in the Rules of Court.

11. Article 4 requires reasons to be given for the Court's opinions and provides for the possibility for individual judges to deliver separate opinions. This is in keeping with the Rules of Court on advisory opinions under the current system (Rule 88 § 2) although it has been the practice of the Court when issuing advisory opinions to endeavour to speak with one voice.

12. Article 5 states that advisory opinions are not to be binding. This reflects the majority view of the Court as expressed in its reflection paper (paragraph 24). The explanatory report (paragraphs 25-27) provides the background to this. Firstly, it is in the nature of a dialogue that it should be for the requesting court to decide on the effects of the advisory opinion in the domestic proceedings. Secondly, as indicated above, it will be open to a dissatisfied party to bring an application to Strasbourg once a final decision has been given at national level.

13. The Court notes two important practical and partly related issues. The first is that, since the domestic proceedings are stayed pending the delivery of the opinion, there is a clear need for the advisory procedure to be completed within a reasonably short time and therefore for it to be given a degree of priority. This is underlined at paragraph 17 of the explanatory report, where it is also pointed out that this implies an obligation for the requesting court to be precise and complete in the formulation of its request. The Court accepts the need for expeditious handling of requests and simply recalls that this requires the co-operation of all those concerned.

14. The second issue is a linguistic one. Paragraph 13 of the explanatory report states that requests may be made in the language used in the domestic proceedings and Article 1 § 3 of the Draft Protocol indicates that requests are to be accompanied by annexes of relevant documents "setting out the relevant legal and factual background of the pending case". The Court notes that the possibility of submitting the request in that language is not included in the text of the Protocol. The Court is opposed to the proposal that it should be for it to ensure translations of such requests and accompanying documents. Even if it can understand the thinking behind this, the result is to impose on the Court a costly burden of translation. At paragraph 23 the explanatory report points out that in many legal systems the domestic proceedings can be resumed only once the opinion has been made available in the language of those proceedings. Here again the Court has hesitations about what is meant by the suggestion that the Court would "co-operate" with the national authorities in the timely preparation of such translations. The Court is of the view that this could involve a considerable increase in its workload and, in fact, raises the question of who should pay for the translation. It is obvious that if the Court should assume the responsibility for the translations, the corresponding budgetary resources must be made available to it.

Conclusion

15. The Court has no serious difficulty with the proposed draft as it stands, except for the reservation made at paragraph 14 above relating to the proposed linguistic regime. It concludes by reiterating its appreciation that the CDDH has produced a final draft that largely accords with the Court's reflections on the subject.