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PROTOCOL 16 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FREEDOMS

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Abstract. *Although the primary jurisdiction of the European Court of Human Rights is the one relating to applications, the Court also has advisory jurisdiction which was established by adopting Protocol 2 in 1963. However, the scope of this Protocol was limited in a twofold manner: the circle of entities authorized to request an advisory opinion was very narrowly defined and there were also uncertainties as to the type of legal issues that may require review. Only the Committee of Ministers had the authority to request an advisory opinion, provided that the decision was made by a two-thirds majority vote. Moreover, the advisory opinion could only be requested on the questions that did not fall within the scope of content, interpretation and/or effects of the rights and freedoms guaranteed under the European Convention and the related protocols. As a result of this restrictive approach, Protocol 2 has been applied in only three cases so far, for which reason it is considered to have little practical significance.*
The idea of expanding the Court's advisory jurisdiction was revived in the process of reforming the European human rights protection mechanism. The result of these endeavors was the adoption of Protocol 16 in 2013, which is yet expected to enter into force. Protocol 16 aims to achieve a dual objective: 1) to intensify and strengthen the dialogue between higher national courts and the European Court; and 2) to reduce the large backlog of applications. During the drafting process, the debate was concentrated on four key issues: a) the nature of the authorized national courts; b) the legal effect of advisory opinions; c) the category and type of questions which may be referred; and d) the process of adoption of advisory opinions. However, despite some good legal solutions, there are some reservations on the likelihood of accomplishing the goals envisaged in Protocol 16.

Key words: *Protocol 2, Protocol 16, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, advisory jurisdiction, advisory opinion.*

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1. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) is one of the most important international treaties which has established the most efficient system of human rights protection (Tomushat, 2006: 237). The contribution to the efficiency of this system is its continuous improvement by adopting sixteen protocols of substantive and procedural nature. The European Court on Human Rights (ECtHR), based in Strasbourg, has the central position in the European human rights protection mechanism. The primary and prevalent jurisdiction of the Court is to decide on applications but, since the adoption of Protocol 2 in 1963, the Court has also had advisory jurisdiction. However, given the narrowly defined circle of entities authorized to request an advisory opinion as well as the uncertainties regarding the type of legal questions which may be referred to the Court for an advisory opinion, the possibility of seeking advisory opinions was scarcely used (Leach, 2007: 14). Although Protocol 2 entered into force in 1970, it has been applied only three times so far and is thus considered to have little practical significance (Đajić, 2012: 172). Despite the fact that the Court's advisory jurisdiction may be of great importance for uniform interpretation and further development of law, the significance of Protocol 2 was reduced to a minimum from the outset. As it is "a shame that the advisory jurisdiction does not have a wider scope" (Dijk, Hoof, 2001: 246), there have been propositions to expand the advisory jurisdiction by amending Protocol 2. The proposals concerned: 1) expanding the legal questions that would affect the rights and obligations under the ECHR and its protocols, provided that they are not directly related to the dispute; and 2) broadening of circle of bodies eligable to refer the request for an advisory opinion (formerly only the Commission, Parliament, and each State Party). The restrictions contained in Protocol 2, as well as the desire to further increase the efficiency of the Court, led to the adoption of Protocol 16 in 2013, which significantly expanded the advisory jurisdiction of the Court.

2. THE ADOPTION OF PROTOCOL 16

Although the idea on adopting Protocol 16 was put into effect at the Brighton Conference (2013), it originally dates back to 2006. It must be noted that the idea originally stems from the Report of the Group of Wise Persons made in 2006 and submitted to the Committee of Ministers within the framework of the Council of Europe; the Report was made under the Action Plan adopted at the Third Summit of Heads of State and Governments in May 2005,[1] which was based on the initial Court's proposals received during the drafting of Protocol 2 of 1962 and the subsequent critical remarks addressed to this Protocol.

The Report of the Group of Wise Persons referred to the possible directions for further reforms of the European human rights protection system, and stated 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 ECHR and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role." In the opinion of this group, only constitutional courts or courts of the highest instance should have the right to submit a request for an advisory opinion, which would be legally non-binding.

[1] Explanatory Report, para. 1.

On these premises, negotiations were initiated at intergovernmental conferences and the proposals were for the most part analyzed by the Steering Committee for Human Rights (Comité directeur pour les droits de l'Homme, hereinafter: CDDH). After the Izmir Conference, deputy ministers invited the CDDH to prepare specific proposals for the adoption of a new treaty. Experts from the Netherlands and Norway drafted a detailed proposal contained in the final report of the CDDH and submitted to the Committee of Ministers. In addition, the Court had prepared and submitted a "Reflection Paper on the proposal to extend the Court's advisory jurisdiction". All suggestions were discussed in detail during the preparation and in the course of the Brighton Conference. On that occasion, the Committee of Ministers decided that the draft optional protocol be prepared by the end of 2013.

Shortly after the Brighton Conference, the work on the draft commenced according to the established procedure, according to which the Committee of Ministers is required to give instructions to the CDDH for preparing the draft while the drafting process was entrusted to a working group within the CDDH. After the draft had been prepared by working group, it was considered at the plenary session of the Committee of Experts on the Reform of the Court. Thene, the draft was subjected to the second reading and analysis procedure within the CDDH, after which it was approved and submitted to the Committee of Ministers for adoption. Upon the request of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe gave its opinion on the draft, which was finally adopted at the 1176th meeting of the Committee of Ministers and opened for signature on 02. 10. 2013.

Unlike Protocol 2 which was incorporated into the text of the ECHR, Protocol 16 does not envisage such a solution. It will remain a separate treaty, which may enter into force only provided that it has been ratified by only 10 states. Despite the fact that it does not change the text of the ECHR, and that a very small number of ratification instruments are needed for its entry into force, Protocol 16 bans any reservations.[2] The Protocol has been signed by 14 states but not a single ratification instrument has been deposited so far.[3]

3. THE PROVISONS OF PROTOCOL 16

During the drafting process, the controversy included the following four issues: a) the nature of the authorized national body of authority; b) the legal effect of an advisory opinion; c) the category and type of questions which may be referred to the Court; and d) the process of adopting advisory opinions.[4]

3.1. Nature of the authorized national courts

During the negotiations for its adoption, Protocol 16 was designated as a "dialogue protocol". Although the promotion of cooperation between national courts and the ECtHR was pursued from the outset, there was a dilemma how far to go in defining the term "authorized national court". Given the recognized necessity to narrow the circle of authorized courts, the inspiration for the solution came from the European Union law (Gragl, 2013: 230-231). In

[2] Art. 9 of Protocol 16.
[3] The list of countries, available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=214&CM=7&DF=25/08/2014&CL=ENG (assessed 20.08.2014.)
[4] Explanatory Report, para. 9.

fact, Article 1 of the Protocol states that the higher courts or tribunals may request an advisory opinion from the ECtHR. The linguistic interpretation of this provision indicates that this right is pertinent not only to the highest courts in the national judicial structure but also to all the other higher or second-instance courts in a specific category of cases. Thus, in addition to supreme and constitutional courts, other national courts may be entitled to request an advisory opinion, which constitutes the most significant deviation from the initial proposal made in the Group of Wise Persons Report. This solution clearly has many similarities with the eligibility of national courts of EU Member States to refer preliminary questions to the Court of Justice in Luxembourg. Specifically, it is similar to the so-called "concrete theory" on the obligation of national courts to refer preliminary questions, where the position of the court in the judicial hierarchy is irrelevant but what really matters is that there is no right of appeal against the decisions of this court (Radivojević, Knežević-Predić, 2008:182).

In order to avoid any dilemma on the issue which national courts have the right to refer the request for an advisory opinion, a significant role is given to the State Parties. According to Article 10, alongside with the ratification instrument, all State Parties are obliged to submit a declaration to the Secretary General of the Council of Europe which includes a list of all higher courts which are vested with this right. The list may be modified "at any time", either by narrowing or expanding the number of competent courts, which ultimately implies that the State Parties are given considerable freedom of choice.

3.2. Legal effect of advisory opinions

In public international law, advisory opinions are non-binding. This principle has been accepted in both protocols - Protocol 2 and 16. Given the fact that Protocol 16 was adopted in the context of inter-court dialogue and cooperation, the legal solution envisaged in Art. 5 of Protocol 16 is quite logical as it provides that obtained advisory opinions are not binding. The national court which has made the request for advisory opinion is free to decide whether to abide by the obtained advisory opinion or not in further court proceedings. Moreover, the obtained advisory opinion does not impede the parties from referring a request to the Court at a later point[5], which ultimately gives rise to two alternative scenarios. If the national court abides by the advisory opinion, the Court is most likely to refuse to consider the application. However, if the domestic court does not act in line with an advisory opinion, there is a risk of subsequent duplication of proceedings before the Court, in case the party dissatisfied with the outcome of the national procedure decides to refer a request to the Court.

When it comes to the territorial scope of Protocol 16, the new judicial practice primarily embodied in *Al-Skeini* case (Djordjevic, 2011: 591-593) established that the request may also be submitted by higher courts operating in the territories where the Contracting States effectively hold power. Certainly, a contracting party may (as usual) file a separate declaration seeking to exclude the application of the Protocol within a specific territory that falls under its sovereignty. Although advisory opinions are not regarded as precedents, they fall within the corpus of case law, just like judgments and other decisions of the ECtHR.

[5] In compliance with Art. 34 of the Convention.

3.3. The nature and type of questions which the request may refer to

The third key issue in drafting the text of the Protocol was to define the categories and types of questions that could be referred for an advisory opinion. Although Protocol 16 aimed to specify as precisely as possible the formal prerequisites for submitting the request, the type of questions that could be lodged remained somewhat vague. There is no doubt that the request for an advisory opinion must relate to legal issues as well as to specific cases involving actual disputes pending before a national court. Thus, the Court avoids giving opinions on abstract or hypothetical legal questions, which is another similarity with the indirect jurisdiction of the Court of Justice (Knežević-Predić, Radivojevic, 2009: 177). The Court is not allowed to consider or establish the factual background, which is the duty of the national court.

According to the wording of the Group of Wise Persons Report, which was later taken over by the Court, State Parties may submit requests on the issues related to the interpretation or application of the rights and freedoms envisaged in the Convention or its related protocols. This definition is inspired by the Art. 43 (para. 2) of the ECHR regarding the civil jurisdiction of the Grand Chamber, which subsequently generated a dilemma on how to distinguish between the question referred for the purpose of obtaining an advisory opinion from the identically defined question lodged in the process of deciding upon applications. The question is whether the intention of the creators of Protocol 16 was to reduce the Court caseload, which would first allow the national court to "touch ground" by seeking an advisory opinion and, then, "strike the right balance" in submitting the application for adjudication on the identically defined issue , in the event that the national court did not comply with the obtained non-binding advisory opinion. On the other hand, if the national court abides by the advisory opinion, there is no need to refer the case to the European Court again, which would significantly reduce the Court caseload within its civil jurisdiction. P*rima facie*, it may seem to be a great solution, necessarily leading to a win-win combination. However, this attempt to ease the Court caseload has been criticized by many scholars who noted that it does not entail an actual decrease of the Court caseload but only the distribution of Court activities into two separate competences: the advisory opinion and the application procedure.

3.4. The procedure for adopting advisory opinions

Unlike Protocol 2, Protocol 16 contains some basic rules of procedure. The higher national courts may refer a request for an advisory opinion in all the official languages of the State Parties. A panel of five judges decided if the admissibility requirements have been met, upon which the request is sent to the Grand Chamber which is to decide on the merits of the specific case.[6]

It may be interesting to point out to the obligation of the Court (the five-member panel of judges) to explain the reasons for refusing to consider a request for an advisory opinion. Given the fact that Protocol 14 does not envisage this obligation, it has been subject to extensive criticism, which is eventually believed to have contributed to envisaging a better solution in the *protocol of dialogue*. Bearing in mind that the objective of Protocol 16 is to establish better cooperation and communication, the solution involving clarification (even in case the request is rejected) is reasonable. Namely, if the Protocol is aimed at providing

[6] This solution is identical to the solution in Art. 43 of the Convention.

assistance to the national courts by enhancing mutual cooperation and communication for the purpose of interpretation of law, any other solution would be unreasonable.

Although the five-member panel of judges decides on the jurisdictional issue ("*Kompetenz-Kompetenz*"), it is only the Grand Chamber that is authorized to issue an advisory opinion. It may give priority to an pressing request for an advisory opinion and consider it in an expedite proceeding. The composition of the five-member panel of the Grand Chamber includes a judge (appointed *ex officio*) from the the national court of the State Party which has filed the request (Art. 2, § 3).[7] Although the legal communication proceeds between the ECtHR and the national court at hand, the ECtHR shall notify each State Party about the request submitted by its national courts.

The advisory procedure may also include the representatives[8] of the State Party whose national court has lodged a request by filing written submissions or by taking part in the oral procedure (Art. 3).[9] Bearing in mind the non-binding nature of the advisory opinion, this process implies a right rather than an obligation to participate. The President of the Court has the power to summon any other State Party or person to participate in the advisory procedure. These natural persons or legal entities are assumed to have been litigants in the proceedings before the national court which has submitted the request. The question is whether such a restriction concerning the participants in the advisory procedure is effective, or whether a more appropriate solution might be to avoid imposing conditions on participation by summoning the parties. Bearing in mind the principle of state immunity before the courts of other states (Shaw, 2003: 638-640), and particularly given the fact that the national court proceedings include natural and legal person, there is a question which of the other State Parties could be summoned to participate in the proceedings.

The advisory opinion require a majority vote of the members of the Grand Chamber. According to Art. 4, in the absence of unanimity, a judge may issue a separate opinion. The Court is obliged to deliver the advisory opinion not only to the court which has submitted the request but also to the State Party whose national authority has submitted the request. The Explanatory Report on Protocol 16) indicates (in para. 23) that "an advisory opinion should also be delivered to all participants in the procedure." In the forthcoming period, the Court is certainly expected to regulate the details of the procedure, but it does not necessarily imply that all participants will actually get an advisory opinion. Even if it does not happen, considering the obligation imposed on the State Parties to publish the advisory opinions delivered by the Court, the general public will be informed about the obtained advisory opinion.

4. ENTRY INTO FORCE AND LEGAL EFFECT

Unlike all previous protocols, Protocol 16 will enter into force three months after the 10th ratification instrument has been deposited, which is an important but unprecedented deviation from the established rule that protocols shall enter into force only after being ratified by all State Parties. This solution is certainly the result of a compromise but it is also a consequence of the specific nature of the Protocol. When it comes to the accomplished

[7] This solution is similarily to the one contained in Art. 26, §4 of the Convention.
[8] Thus, the procedure fully emulated the procedure provided in Art. 36 of the Convention, under which these entities may participate in the litigation procedure.
[9] The European Commissioner for Human Rights of the Council of Europe may also participate in this procedure.

inter-state compromise, it may be assumed that the State Parties wanted to avoid the predicament of Protocol 14.

In fact, given its optional nature, the scope and the effect of Protocol 16 will be limited. The limited scope is expected to shorten the period for the Protocol to enter into force but it is concurrently expected to create two distinct categories of State Parties: those that have adopted the Protocol 16 and those that have not accepted it. The success and popularity of Protocol 16 will largely depend on its immediate application in the states which decided to adopt it and, particularly, on the experiences and benefits for the national courts of these states.

5. Concluding Remarks

The adoption of Protocol 16 has only partially rectified the dual constraint underlying the submission of advisory opinions, established by Protocol 2. Protocol 16 provides that national higher instance court may refer a request for an advisory opinion of the ECtHR. The extension of the Court's advisory jurisdiction is aimed at accomplishing two goals: a) to intensify and strengthen the dialogue between higher national courts and the European Court, and b) to reduce the large backlog of applications.

The first objective will be achieved if the Court assumes a position of a participant in a constructive dialogue, by providing assistance to national courts in resolving problematic issues or perhaps by giving detailed and *bona fides* explanations in case the request has been refused. In this case, we may expect that Protocol 16 will be accepted by the remaining State Parties to the ECHR. It is assumed that the first cases pertaining to the Court's advisory jurisdiction will refer to the crucial issues, such as: jurisdiction, incoherent case law, different theoretical conceptions on the margin of appreciation, and all disputable issues which have been present in the past relations between national courts and the Court in Strasbourg. On the other hand, if the Court provides insufficient argumentation on refusing a request, or if it does not have a clear vision of prospective development of its judicial practice on certain sensitive issues, it will generate considerable distrust in the system which is being established by Protocol 16.

Even though the cooperation between the courts is hailed in legal theory as an example of positive practice, there is an implied risk that it will undermine the autonomy and responsibility of national courts. Protocol 16 is not aimed at creating a system where the national courts will adjudicate cases merely on the basis of the obtained advisory opinion. On the other hand, in the case a domestic court does not act in line with the advisory opinion, it will give rise to a new problem of duplicating the proceedings before the ECtHR on the basis of both Court competences (O'Meara, 2013).

In addition to expanding the advisory jurisdiction, Protocol 16 affects the so-called constitutional function of the Court; some authors consider that this function might be better exercised via deciding on applications. In fact, the evidence of "constructive dialogue" between the national courts of the highest instances and the European Court already exist within the Court's civil jurisdiction, without the need to reform the European protection system in the direction of expanding the advisory jurisdiction. All things considered, the positive effects of Protocol 16 concerning the strengthening of cooperation and dialogue between national courts and the European Court may be undermined.

When it comes to the second objective, i.e. increasing the Court efficiency, Protocol 16 creates a risk of deteriorating the existing situation instead of achieving the set goals. Given the fact that the Court is overloaded with excessive backlog and a growing number of upcoming cases, there is no inherent logic in the idea that the Court will be "helped out" by extending its jurisdiction into another field, especially taking into account that the Grand Chamber annually delivers no more than twenty judgments. If we recall that the largest number of applications filed with the Court include the so-called repetitive or "cloned" cases and inadmissible applications, there is a reasonable doubt that the solutions envisaged in Protocol 16 may contribute to reducing the caseload. Repetitive cases are best resolved by adopting the so-called *pilot* judgment, whereas the requirements governing the admissibility of applications have been gradually clarified and become more stringent, which also applies to the admissibility procedure itself. [10]

In case of repetitive procedures, the intended goals are again quite contrary to the actual circumstances. Namely, after obtaining the Court's advisory opinion, the national court may submit another application but on a different ground. Instead of enhancing the Court efficiency, it will increase the overall Court caseload.

All things considered, it may be concluded that the advisory jurisdiction would only be useful for setting up new standards. The Court is known to have exercised this power within its jurisdiction concerning applications. Thus, although the intended objectives are commendable, there are still some reservations that Protocol 16 will be able to accomplish these goals. In case the aforementioned risks prevail in practice, Protocol 16 will not take full effect, just like Protocol 2. However, if the positive solutions prevail, Protocol 16 will contribute to achieving a more coherent human rights protection system. As a result, the Court will no longer be characterized as a "victim of its own success" (Helfer, 2008: 125); instead, it will help the Court maintain the status of the most efficient international community court in the field of human rights protection.

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[10] Upon analyzing the statistical data on the structure and the type of individual petitions, the representative of the Parliamentary Assembly of the Council of Europe stated that the Court must urgently find a way to solve three key problems. Specifically, he noted that judges should not spend too much time on clearly inadmissible applications, which amount to about 95% of all applications. Then, an effective solution is to be found for resolving the problem of the so-called "cloned" cases, i.e. cases involving established systemic deficiencies within the country (which represent approximately 70% of cases where the Court decided on the merits). Protocols 14 and 15 were adopted as a response to the first issue; they tried to reduce the number of applications primarily by redefining the eligibility conditions. When it comes to solving the problem of "cloned" cases, the Court introduced the so-called *pilot* judgments, which resolve a large number of cases originating from the same systemic problem that exists in a State Party.

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PROTOKOL 16 UZ EVROPSKU KONVENCIJU O LJUDSKIM PRAVIMA I OSNOVNIM SLOBODAMA

Iako je primarna nadležnost Evropskog suda za ljudska prava odlučivanje po predstavkama, odnosno parnična nadležnost, još 1963. godine, usvajanjem Protokola 2 uspostavljena je i savetodavna nadležnost. Međutim, njime je izvršeno dvostruko ograničenje. Naime, bio je izuzetno usko definisani krug subjekata ovlašćenih da zatraže savetodavno mišljenje, a takođe su postojale i nejasnoće u vezi tipa pravnih pitanja o kojima se može zatražiti mišljenje. Jedino je Komitet ministara, pod uslovom da se izglasa odluka dvotrećinskom većinom, bio ovlašćen da zatraži savetodavno mišljenje, a samo su se mogla postaviti pitanja koja se nisu ticala garantovanih prava i sloboda iz Evropske konvencije, kao ni pripadajućih protokola. Ovako restriktivan pristup imao je za posledicu primenu Protokola 2 u svega tri slučaja, što je uslovilo njegov mali praktičan značaj.

U procesu reforme Suda, oživela je stara ideja o proširivanju savetodavne nadležnosti, koja je realizovana 2013. godine, usvojanjem Protokola 16. Njime je teži ostvarivanju dvostrukog cilja: 1) intenziviranju i ojačanju dijaloga između viših nacionalnih sudova i Evropskog suda, kao i 2) smanjenju velikog broja nagomilanih predstavki. Tokom procesa njegovog sačinjavanja, polemika se vodila povodom četiri ključna pitanja: a) prirodi ovlašćenog nacionalnog organa; b) pravnom dejstvu savetodavnog mišljenja; v) kategoriji i vrsti pitanja povodom kojih se može uputiti zahtev; g) postupku donošenja savetodavnih mišljenja. Međutim, uprkos nekim dobrim rešenjima, javlja se sumnja da li će Protokol 16 uspeti da ostvari zacrtane ciljeve.

Ključne reči: *Protokol 2, Protokol 16, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropski sud za ljudska prava, savetodavna nadležnost, savetodavno mišljenje.*