European Journal of Law and Public Administration
ISSN: 2360-6754 | e-ISSN: 2559-7671
Covered in: Erih Plus; HeinOnline; CEEOL; RePEc; CrossRef; Google Scholar; KVK; WorldCat; ICI Journals Master List - Index Copernicus; EBSCO

2022, Volume 9, Issue 2, pages: 23-33 | https://doi.org/10.18662/eljpa/9.2/179

Protocols Nos. 15 and 16 to the European Convention on Human Rights – Amendments and New Trajectories

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Abstract: This paper aims at emphasizing, in its first part, the development of the European Convention on Human Rights, as it was mirrored during time due to the significant changes that its Protocols brought to the initial form of the European document. More specifically, this approach focuses on the reconfiguration of the Convention under the auspices of Protocol No. 15 (Council of Europe, 2013a) and Protocol No. 16 15 (Council of Europe, 2013b) and tries to map the most important changes brought by these two instruments as well as the manner in which they impacted the procedures and the entire European jurisdictional construct. This way, the first one is an amendment protocol which materializes in the rethinking of the Preamble of the Convention by specifically stating the principle of subsidiarity and the margin of appreciation. Therefore, the reason of introducing these two concepts reconfirms their importance while applying the provisions of the Convention. Additionally, this Protocol introduces a few procedural changes as well as a series of aspects related to the structure and the organization of the European Court of Human Rights. Secondly, Protocol No. 16 to the Convention tries to enhance communication between the Court and the domestic courts by introducing the advisory opinion procedure and stating upon those entities entitled to access it, also specifying a series of conditions which have to be fulfilled when seeking for an advisory opinion.

Keywords: *European Convention on Human Rights; Protocol No. 15; Protocol No. 16; European Court of Human Rights; margin of appreciation; subsidiarity; advisory opinion; dialogue.*

How to cite: Cureluşă, L.-F. (2022). Protocols Nos. 15 and 16 to the European Convention on Human Rights – Amendments and New Trajectories. *European Journal of Law and Public Administration*, *9*(2), 23-33. https://doi.org/10.18662/eljpa/9.2/179

1. Short considerations

The protection of human rights manifested itself prior to the Second World War with careful reference to certain social categories that targeted either national or religious minorities, people affected by the armed conflicts that marked society at the beginning of the 20th century or industrial workers, all these people representing basically the social exponents of those times. After the Second World War, the real prerogative of human rights protection shifted from being limited exclusively to certain social groups to being an extension to the global protection of human rights (Năstase & Aurescu, 2012, p. 169). Thus, the doctrine defines international human rights law as the field that *„concerns international norms that acknowledge rights and faculties to the individuals, without discrimination, in order to ensure the freedom and dignity of the human being, also providing institutional guarantees in this regard”* (Ciucă, 2017, pp. 41-42; Sudre, 2008, p. 21). This way, by referring to the normative framework revealed by the international law, the emergence of protection of the human rights systems was necessary and the main role of these systems was to cover possible interferences that might occur in the sphere of effective protection of the wide palette of rights conferred to the person.

Following closely the vein drawn by the doctrine, which attests that the mechanism by which the human rights are protected is *„a segment of the general international law based on the idea of respecting the rights of individuals by each individual state”* (Ciucă, 2017, p. 41) the approach undertaken by the international sphere in standardizing the framework for the protection of human rights is evident, this approach being carried out through the mechanism of international conventions - as binding documents with a decisive impact on national legislation. In addition to the well-known UN system for the protection of human rights, the regional systems are also of paramount importance so that, in the outline of this study it is also necessary to highlight the way in which the European entities shaped a mechanism in order to protect human rights. This process had as a basis the European Convention on Human Rights, document which came into effect on the 3rd of September 1953. The Convention, also called *„the fundamental work of the Council of Europe”* and *„a real pivot of the European protection of human rights”* (Sudre, 2006, p. 112) was shaped *ab initio* as an instrument who focused on shielding the civil and political rights, among which an increased attention was paid to the provisions related to the right to life, the person's liberty and security, the inviolability of the person, home or correspondence, freedom of conscience, religion or expression (Năstase & Aurescu, 2012, p. 171).

Gradually, the requirements imposed by the original format of the Convention were subjected to reconfiguration. Although sixteen additional Protocols have been adopted so far, a remarkable first step in reforming the mechanisms established by the Convention was achieved through Protocol No. 11 which was adopted on the 11th of May 1994 and entered into force in 1998 – a document establishing the foundation of a single, permanent European control body - the European Court of Human Rights. (Selejan-Guțan, 2018, pp. 43-44) Another huge step in the reformation of the Convention and an essential exponent of the reform established by Protocol No. 11 concerns the right of individual applications which tends to reaffirm the importance of the individual and his access to the European Court as well as to reiterate the uniqueness of the European justice system outlined by the Convention, whose control mechanism is being unequivocally reinvented, *„moving its emphasis from the inter-state applications to the settlement of individual requests”* (Ciucă, 2017, pp. 75-76).

The necessity of reforming the control mechanism encompassed by the Convention was later outlined by Protocol No. 14 which was the result of a long process that aimed to an improved perspective regarding the Court's approach to the jurisdictional control mechanism, by introducing procedures that would facilitate the entire functioning mechanism and direction of action of the Strasbourg Court (Năstase Năstase & Aurescu, 2012, p. 171). Therefore, the emerging cause of this new instrument mainly concerned the overwhelming volume of individual requests addressed to the European Court, which is why it was sought to relieve it and outline an effective mechanism that would respond to the desideratum of the Convention - that of giving meaning to a system of collective guarantee of human rights (Selejan-Guțan, 2018, p. 44).

2. Protocol No. 15 to the European Convention on Human Rights – premises and the resulting legal mechanism.

It is obvious that the evolution of the legal trajectories and the need to ensure an effective framework for the protection of human rights influenced the major changes of the Convention, so that, in addition to the formal changes, its content also underwent changes stemming from the desire to accord the provisions of the Convention with the existing societal realities as well as to the potential disputes that might occur. Being considered a genuine amendment protocol, Protocol No. 15 takes shape as a result of the numerous frictions and multiple debates that materialized in the Action Plan adopted in 2010 at the Interlaken Conference. Later on, the meetings that took place at the Izmir Conference in 2011 and the Brighton

Conference in 2012, contributed to the improvement of the Protocol, whose final form, as we know it today, was adopted in 2013 (Selejan-Guțan, 2018, p. 46).

As a result of the described events, the form of the Convention undergoes changes due to the provisions of Protocol No. 15 so that its novelty element is the reanalysis of the Preamble of the Convention which was reconfigured. According to Article 1 of the Protocol, new considerations are inserted into the text of the Preamble section, being therefore noticed the introduction of two essential notions for the rearranging of the entire mechanism implemented by the Convention: the principle of subsidiarity and the margin of appreciation.

This way, the Convention mentions for the first time ***the margin of appreciation*** notion, which has strong implications in the solutions pronounced by the European judicial body. In doctrine, this approach has been perceived as essential for the proper functioning of the Strasbourg Court, the margin of appreciation designating a *sine qua non* element for the way the Court reasons (Selejan-Guțan, 2018, p. 46). Being considered *„the expression of a functional necessity"* (Ignat, 2015, p. 78) the margin of appreciation is being reflected in the essential role conferred to the national court, respectively in the European judge's understanding of the fact that the national judge is familiar with both the internal social realities and the rigorous way in which the deliberative activity is being coordinated and organized, according to the provisions of the Convention. This idea was also emphasized in jurisprudence, where it was stated that: *„due to direct and constant contacts with the living forces of their countries, the state authorities have a greater competence than the international judge in pronouncing on the requirements of the public order and on the necessity of limiting a certain liberty"* (Case of Handyside v. United Kingdom, 7th of December 1976, Ignat, 2015, p. 78).

Inextricably linked to the margin of appreciation is ***the principle of subsidiarity*** which was for the first time expressly provided in the Preamble of the Convention under the auspices of Protocol No. 15 to the Convention.

Therefore, subsidiarity emphasizes that *„the first responsible for the way in which human rights are being respected and the first ones to interfere when the rights have been violated are the states. International structures intervene only in a subsidiary way when the statal mechanisms are unsatisfying"* (Popescu, 2000, p. 12.) As far as the subsidiarity principle is concerned, there are some opinions according to which: *„the guarantee of the rights provided by the European Convention on Human Rights should be primarily demanded to the contracting states which have to ensure themselves that the provisions of the Convention are being respected, these national entities*

having, besides that obligation, the one of removing the consequences arising from the possible violation of those rights" (Bîrsan, 2005, p. 98)

The doctrine has constantly emphasized the relevance of subsidiarity of the human rights protection mechanism which was developed under the auspices of the Convention compared to the national mechanisms which guarantee that the rights are being respected. Thus, by definition, the principle of subsidiarity *„implies the recognition of national autonomy in applying the provisions of the Convention and represents the basis of the margin of appreciation theory"* (Selejan-Guțan, 2008, p. 36) Moreover, it was stated in the doctrine that what defines the principle of subsidiarity is precisely the prevalence of the individual, so it emphasizes the importance of the human being and dignity, to the detriment of the interests of the state (Ciucă, 2017, p. 78).

Ultimately, the express consecration of these two concepts in the Preamble of the Convention is nothing but a reaffirmation of their importance and their obvious implications for the application of the Convention. Therefore, as it is stated in the Explanatory Report of Protocol No. 15 amending the Convention, this approach did nothing but create a more transparent and accessible normative framework and managed to confer to the states the prerogative of appreciating the manner in which they apply the provisions of the Convention, permanently relating to the particularities of the case which is being analyzed by the domestic courts, as well as the specific rights involved (Council of Europe, n.d.b., par. 7, par. 9).

Although devoid of any legal force, the Preamble of the Convention gives meaning to the legal interpretations of the European reference document in the sphere of human rights protection, its innovative addition *„giving the margin of appreciation an interpretive authority"* (Selejan-Guțan, 2018, p. 46).

The reconfiguration of the Preamble is not the only novelty encompassed by the Protocol No. 15, this document also emphasizing a number of structural and organizational changes regarding the European Court of Human Rights, as well as a series of procedural aspects connected to it. Consequently, an important change is registered in Article 21 of the Convention where an additional paragraph is added. This states some aspects regarding the election of the judges of the Strasbourg Court, more precisely the age criterion which should be met by them, numerically consecrating the age of 65 years old. The reason for introducing this new this paragraph underlines the idea of appropriating experienced judges in the structure of the Strasbourg Court *„thereby reinforcing the consistency of the membership of the Court"* (Council of Europe, n.d.b., par. 12) Due to the provisions brought by Article 21, par. 2, the second paragraph of Article 23,

which previously mentioned that the age limit of the judges who were taking office was 70 years old, is deleted. The Explanatory Report pinpoints that this previously consecrated age limit was meant to be an impediment for some knowledgeable judges to end up their mandate (Council of Europe, n.d.b., par. 12).

There are also major procedural changes, so that Article 30 of the Convention has been amended. It is therefore emphasized that the parties no longer have the right to oppose to those situations in which a case managed by a Chamber of the Strasbourg Court is subsequently voluntarily ceased to the Grand Chamber (Council of Europe, n.d.b., par. 16) this change aiming to a procedural acceleration as well as to ensuring that the Court's jurisprudence does not suffer fluctuations.

Regarding the conditions for the admissibility of individual applications, the amendments brought to Article 35 emphasize the fact that this type of procedure can be accessed in a four months period of time, starting from the precise moment when the final decision was pronounced (European Court of Human Rights, & Council of Europe, n.d., Article. 35, par. 1) instead of a six months period of time which was stated in the previous form of the Convention, before it was amended.

Another admissibility criterion which was modified by the Protocol No. 15 is the one found within Article 35 par. (3b) of the Convention. This article refers to the admissibility criteria of an individual application, respectively to those situations in which the Court declares as inadmissible such a request. This way, Protocol No. 15 amends the initial form of the article, especially those aspects referring to the „significant disadvantage" and eliminates that provision regarding the fact that a case must be properly analyzed by the national courts. Thus, these modifications lead to the present version of Article 35 par. 3(b) which states that the Strasbourg Court can reject an individual application in those situations in which it is considered that the one applying has not suffered a „significant disadvantage" except from those cases in which respect for human rights is involved (European Court of Human Rights, & Council of Europe, Article. 35, par. 3b).

In addition, if prior to Protocol No. 15 it was possible for the Court to reject an application taking into consideration the insignificant damage felt by the petitioner, this mechanism undergoes changes under the auspices of Protocol No. 15, therefore *„the possibility of rejecting an application on these grounds being limited"* (Ciucă, 2017, p.78).

3. Protocol No. 16 to the Convention – a short analysis.

Seen through a different perspective, one *„of dialogue"*, **Protocol No. 16** – which is an additional protocol and not an amendment one as Protocol No. 15 - reconfigures the communication mechanism between the Strasbourg Court and the domestic courts, interaction that materializes in the advisory opinion procedure (Ciucă, 2017, pp. 78-79).

Thus, the jurisdiction of the Court is extended, as it becomes entitled to confer advisory opinions also on issues related to the rights and freedoms contained by the Convention, unlike its prior competence, before Protocol No. 16 entered into force, when the jurisdictional entity could only exercise its consultative competence in several matters related to the interpretation of the Convention except for those related to the rights and freedoms guaranteed by it. Moreover, another innovation brought by Protocol No. 16 to the Convention concerns the entities who can ask for advisory opinion (Selejan-Guțan, 2018, p. 47).

The reason for extending the jurisdiction of the Court has its origins in 2005 when the issue of the long-term effectiveness of the control mechanisms established by the Convention was discussed at the Warsaw Summit. Thus, it was then concluded that it would be preferable, if not indicated, to introduce a system whereby national courts could request advisory opinions from the Court on legal issues regarding the interpretation of the Convention and its Protocols, favoring this way the dialogue between the entities (Council of Europe, n.d.c., par. 1). As far as the Explanatory Report of the Protocol No. 16 states in its introductive part, this trajectory was also maintained at the level of the Izmir (2011) and Brighton (2012) Conferences.

Before it entered into force, this possibility was exclusively recognized to the Committee of Ministers. But under the auspices of the current amendments the advisory opinion will be conferred to the national authorities, *„through highest domestic courts or tribunals of the State Parties to address such requests to the European Court"* (Selejan-Guțan, 2018, p. 47). Specifically, the Explanatory Report of the Protocol No. 16 states that the phrase „highest courts or tribunals" refers to those domestic entities which are hierarchically superior at national level and by not introducing the expression „the highest courts and tribunals", the provisions introduced by the Protocol do not limit certain courts, being thus allowed to also include in this category those domestic jurisdictional entities which are still eligible due to the relevance of the solved casuistry, even though they are hierarchically inferior to the superior courts or the constitutional ones (Council of Europe,

n.d.c., par. 8). However, the request for the advisory opinion appears as an eminently optional procedure, there being no obligation for the domestic courts to act in this sense.

As for Romania, it was established through a Declaration of the Permanent Representation of Romania, which was issued in 2014 the fact that the competent domestic jurisdictional entities which are allowed to address the Court in order to obtain an advisory opinion are the High Court of Cassation and Justice, the Constitutional Court and the Romanian Courts of appeal respectively, which were enumerated (Council of Europe, n.d.a.). However, with the entry into force of Law No. 172/2022 for the ratification of Protocol No. 16 it was stated in Article 2(1) that the designated Romanian courts for addressing applications regarding advisory opinion are the High Court of Cassation and Justice and the Constitutional Court, the other categories being, therefore, eliminated (Romanian Parliament, Article 2).

In addition, another aspect introduced by this additional protocol concerns the nature of the issues regarding which the opinion is requested, being mandatory that they be limited to the issues linked to the way in which the rights of freedoms consecrated in the Convention and its Protocols are interpreted and, therefore, applied. Moreover, Article 1 par. 2 of this Protocol states that the request for an advisory opinion must be made with regard to a case pending before the requesting domestic court (Council of Europe, n.d.c., par. 10).

In this sense, as it is stated in par. 11 of the Explanatory Report of the Protocol No. 16, these procedural requirements do not aim at transferring the case referred to the domestic court to the Strasbourg Court but on the contrary, they intend to clarify to the national courts a series of aspects related to the implementation of the Convention. Therefore, the purpose of the procedure introduced by this protocol underlines a new approach, grafted precisely on the consideration that the national judge becomes *„the defender of the individual freedoms recognized at the European level"* (Ignat, 2015, p. 31). For this, it is important for the domestic tribunals or courts to meet the necessary requirements of their approach – the seek for an advisory opinion - so they have to filter the necessity of such a request and have the full range of legal arguments as well as those elements that support the fact-based situation (Council of Europe, n.d.c., par. 11) giving the Court the possibility to concentrate on the problems related to the interpretation or the application of the provisions consecrated by the Convention and its Protocols.

Additionally, the text of Protocol No. 16 also contains detailed issued regarding the procedure that should be followed by the Court in the

context of issuing advisory opinions, which have to be compulsorily motivated. Moreover, by virtue of Article 34 of the Convention, which enshrines the procedure for formulating an individual request, it is of paramount importance to mention that issuing an advisory opinion by the Court does not restrict the right of the parties involved in the national dispute to access the European judicial body – the Court (Selejan-Guțan, 2018, p. 48)

4. Conclusions

Although at the time the Convention entered into force it fully responded to the realities of the times, being intensely channeled on *„limiting state oppression"* (Ignat, 2015, p. 90) it gradually appeared the need to expand the protection area of the rights and freedoms enshrined in the Convention. This was gradually achieved and depended on the needs imposed either by the social and legal dynamics felt at a national level by the State Parties or by the desire to reform the text of the Convention in order to cover the gaps regarding possible rights that would have remained unprotected. For this, the sixteen Protocols of the Convention filled the initial gaps or made improvements to the original text, these essential changes also including the creation of the European Court of Human Rights. Thus, the emergence of the previously analyzed documents - Protocol Nos. 15 and 16 contributed significantly to the improvement of the catalog of rights and freedoms, aligning the European document with the contemporary trajectories.

In conclusion, this approach responds to both social and legal evolutionary challenges and appears as a positive reaction to the need of reforming the legal mechanisms for the protection of rights and freedoms, as they were guaranteed to citizens by the original desideratum of the Convention.

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