

ECHR Reform: Entry into Force of Protocols 15 and 16

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Abstract: *Whereas the application of the European Convention on the Human Rights is made through the European Court of Human Rights, whose decisions are the creator of law, meanings, interpretations, clarifications on everything that means the system of protection of the human rights through the ECHR, the jurisprudence of the Court frequently meets the practical requirements for the application of the Convention. However, certain procedural elements in the application of the Convention cannot be left to the discretion of the Court's decisions, due to their strictly procedural nature, and in some cases there is a need to enrich the Convention with a number of fundamental provisions beyond the court's creative power of practice. That is why the adoption of the Additional Protocols to the Convention always attracts a keen interest from stakeholders, and among these, the Additional Protocols no. 15 and 16 have attracted lively debates in international doctrine, due to the importance of amendments (or clarifications) to the Convention.*

Keywords: *ECHR Reform; Entry into Force of Protocols 15 and 16; Additional Protocols to the Convention.*

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Introduction

As the European Convention on Human Rights is considered to be a “living instrument, which must be interpreted in the light of current conditions” (Tyrer c. Marii Britanii, 1978) even by the European Court of Human Rights, the adoption of Additional Protocols no. 15 and 16 of the Convention should come as no surprise. However, the changes brought about by these two protocols in the ECHR system have given rise to the most diverse reactions in gender legal doctrine, with discussions taking into account the need to adopt these protocols, on the one hand, and what is expected of these protocols with regard to the improvement of the system of protection of the human rights through the Convention, on the other hand. This paper aims to analyze some of these viewpoints, without claims of completeness, but with the intention of emphasizing the effect of the most impactful changes that Additional Protocols no. 15 and 16 bring to the ECHR system.

Protocol no. 15 was adopted following the “Action Plan for the Reform of the European Court”, which was decided at the Interlaken Conference (February 2010). However, at the Izmir and Brighton Conferences, the plan was re-examined, with the Committee of Ministers instructing the Human Rights Steering Committee to draw up a protocol of amendment (Selejan-Guţan, 2018, p. 46). The Protocol entered into force on 01.08.2021, except for the amendment referring to the 4-month deadline for notifying the Court, which has the date of entry into force on 01.02.2022.

The amendments to the Convention by this Protocol relate mainly to the following: 1. for the first time since the entry into force of the Convention, its Preamble is amended by means of a paragraph reaffirming the principle of subsidiarity in the system of the human rights protection under the Convention, as well as the “introduction of a notion elaborated and developed jurisprudentially and which became defining for the reasoning and interpretation of the Strasbourg Court: the margin of appreciation” (Selejan-Guţan, 2018, p. 46); 2. the introduction of the age limit of 65 in order to gain access to the dignity of a judge in the Court; 3. the elimination of the procedural possibility conferred on the parties by the old text of the Convention to oppose the decision of the Chamber to withdraw the favor of the Grand Chamber, in cases involving important interpretations of the Convention or its Protocols (the decision to withdraw is now left exclusively to the discretion of the Chamber); 4. the reduction of the deadline for appealing to the jurisdiction of the Court from 6 months to 4 months from the date of the final internal decision; 5. the elimination of

the two exceptional conditions in the case of the inadmissibility of the material damage, the one relating to the improper examination of the case by the national court.

The additional Protocol no. 16 of the Convention entered into force in August 2018 for the 10 States that have ratified the text of the Protocol and, in essence, it brings with it a single major amendment, but with a significant impact upon the entire system of the Convention: the Court will be able to rule on requesting national courts, through legal advisory opinions, on the interpretation and application of the rights and freedoms set forth in the Convention. This procedural mechanism is at the same time effective and complementary to the existing mechanisms in order to ensure a coherent and efficient functioning of the system of human rights protection in Europe and has been seen by the doctrine as a mechanism similar to that of the questions referred to the Court of Justice of the European Union (Grigoriu & Grigoriu, n.d.).

The need to adopt the additional protocols no. 15 and 16 of the European Convention on Human Rights

The adoption of Additional Protocol no. 15 was dictated by various reasons, as is it results from the variety of amendments made to the Convention. As regards the recital added at the end of the preamble to the Convention, it expressly discusses two principles of fundamental importance in the case-law of the Court: the discretion and subsidiarity (Ignat, 2015, p. 73). On the one hand, the principle of subsidiarity has a dual meaning. On the one hand, the subsidiarity presupposes that the signatory states to the Convention are primarily responsible for ensuring human rights, through their domestic law, and only in the alternative, in the event of a breach of the domestic law will the provisions of the Convention intervene (Buruiană, 2014). From a procedural viewpoint, the principle of subsidiarity presupposes “the obligation of victims of violations of the European Convention on Human Rights to have recourse first to domestic remedies, in order to allow the national judge of a higher court to correct the errors of lower courts so that the national legal system can remove its own violations of human rights and fundamental freedoms” (Antoși, 2016). In applying the principle of subsidiarity, the Court recognizes a certain margin of discretion for the States, namely the freedom of the authorities of any State to choose measures for the implementation of obligations under the Convention (Sârcu & Șiman, 2020). The signatory states of the Convention felt the need to strengthen these two principles, by correlating them in the newly introduced recital, as an element of state responsibility and a reminder of

their positive obligations to their own nationals, beyond the supranational system of protection provided by the Convention on the Human Rights.

The most important provision of the Additional Protocol no. 15 is the reduction of the time limit for referral to the Court from 6 months to 4 months, which can be considered as a consequence of the increase in the workload of the Court, which seems to be a constant concern of the Member States. It is well known that in recent years there have been a very large number of applications which are now pending before the Court, and often those who have made such requests have had to wait for deadlines which were considered unreasonable until they were resolved: “this amendment aims to speed up the introduction of individual appeals, but the new provision will apply only after 6 months from the date of entry into force of the Protocol, so as not to affect the referral rights created by the old text of those who they have already notified the Court during this period” (Selejan-Guțan, 2018, p. 46).

With regard to the removal of the two exceptional conditions from the inadmissibility of the significant damage, the one concerning the improper examination of the case by the national court, the proposal for this amendment was justified as the removal of an unnecessary guarantee which, in fact, has set a higher standard for the Court's examination of the “insignificant” cases than for the “significant” cases (Milner, 2014).

The provision on the maximum allowable age of 65 for the ECHR candidates was intended to ensure the continuity of the panels and the provision on the possibility of dismissing the Chamber in favor of the Grand Chamber without receiving opposition from the parties was seen as a way of harmonization of the Court's case-law through its own mechanism, given that the Court has often been criticized for the inconsistent application of the Convention and the return to its own practice (Milner, 2014).

With regard to the Additional Protocol no. 16, the purpose of the advisory opinion procedure is “to strengthen the interaction between national courts and the European Court of Human Rights, to promote a constructive dialogue between them, in order to serve a stronger integration of the Convention into the domestic law of the States, in agreement with the principle of subsidiarity. More precisely, the aim is to reduce the violation of the rights and freedoms stipulated by the Convention, through the judicial act of the national courts” (Grigoriu & Grigoriu, n.d.).

Additional protocols no. 15 and 16 – expectations and criticisms

Regarding the amendments brought by Protocol no. 15, the European Court of Human Rights applies the „doctrine of the margin of appreciation” to determine the level of intervention of the Court and the limits of the margin of appreciation of states when performing their obligations under the Convention. The reason behind this doctrine is that, in some cases, the national institutions are in a better position than the international judges to provide adequate protection for the human rights, and in this respect, their discretion is recognized. Subsequently, the Court examines only whether or not the interference alleged by a person falls within that margin. This doctrine has given rise to numerous criticisms, considering (Legg, 1999) that it has not been applied transparently and consistently by the Court, that it sometimes serves as an “excuse” or “avoidance” for the Court to resolve certain issues in controversial cases, that it brings a lack of legal certainty which is equivalent to the denial of justice, that it leads to the creation of a matrix for the promotion of moral relativism, respectively that it promotes double standards, which can undermine the credibility of the Court.

In this context, the amendment to the Convention by the Additional Protocol no. 15. The doctrine considers (Kopa, 2014) „that this amendment to the Convention will require the Court to improve its own case-law on the doctrine of the margin of appreciation by developing a clear algorithm that can be used to support the new spirit of the preamble to the Convention”. The appeals made in the doctrine prior (Merrills, 1993) to the entry into force of the protocol, for the abolition of the idea of margin of appreciation, are considered (Kopa, 2014, p. 45) to have become obsolete due to the „adoption of Protocol no. 15. However, the Court will now face a new challenge, as it will have to reflect upon valid points of criticism and try to improve the way in which the margin of appreciation that is considered to be most likely to become of the text of the Convention”.

Although this amendment was introduced with the intention of increasing the transparency and procedural accessibility of the Convention system, it has been argued (Milner, 2014, p. 42) that the preamble to a treaty is not, in fact, part of the text of the treaty imposing obligations on proposals not otherwise accepted during the negotiations of the Treaty are inserted, so Article 1 of Protocol no. 15 will have any practical impact.

The analysis of the amendments brought to the Convention by Protocol no. 15 is continued, although at first sight it is a simple provision; Article 2 paragraph 1 has in fact given rise to some of the most complex

discussions since the adoption of the protocol. The problems raised by this text are given by the aspect of the legal certainty, more precisely by the acceptable reference date according to which to assess the age of the candidate for the dignity of judge of the Court. In order for the new requirement introduced by Protocol no. 15 (European Council, 2013) to be complied with, „it would be necessary to know from the beginning of the national selection procedure the day on which the winning candidate will take up the position. In practice, however, the latter is unpredictable and sometimes it occurs months (or even years) later than originally anticipated”. The question was, therefore, what would have been an acceptable reference date, allowing for legal certainty from the beginning of the selection / selection procedure.

Various alternatives were examined: the date on which the Parliamentary Assembly is expected to hold the elections, January 1 in the year in which the term of office of the new judge began or the date of termination of the term of the previous judge. Finally, the date on which the list of the three candidates is presented to the Parliamentary Assembly was chosen. There were justified hesitations (Milner, 2014, p. 50) regarding this choice, as the Convention itself does not refer to any such list. The alternatives were the date on which the Parliamentary Assembly is expected to hold the elections, January 1 in the year in which the term of office of the new judge began or the date of termination of the term of the previous judge; however, they also failed to reliably provide a sufficient degree of certainty.

With regard to the amendment concerning the withdrawal in favor of the Grand Chamber, the main criticism of this amendment is that the previous procedural option, in which the parties could oppose the withdrawal, offered them the possibility of having two degrees of jurisdiction. Without this possibility, the decision of a Chamber to waive would inevitably mean a single degree of jurisdiction, before the Grand Chamber, whose decision would be final. It is argued that the change has nothing to do with the issue of the volume of cases pending before the Court, which is alleged to be the basis for this change (Milner, 2014, p. 33).

With regard to the reduction of the time limit for referral to the Court from 6 months to 4 months, it was considered that the amendment was introduced without giving „adequate time for reflection on its potential impact on applicants, the quality of applications and the effectiveness of the Court”; thus, the amendment could unjustifiably restrict the ability of persons to apply to the Court, especially for the persons living in remote areas, without internet access, with complicated cases and / or inexperienced

lawyers or for those with limited access to a lawyer. It is considered that the amendment was not accompanied by specific provisions to avoid unfair situations or to disproportionately restrict or even fundamentally undermine the right to submit claims to the Court.

With regard to the amendments made to the case of inadmissibility of the existence of material injury, there are opinions (Garcia Roca, 2019) which consider that this amendment infringes the principles of „effective access to a court and the right to an effective remedy”. Thus, in view of that change, cases which have not been properly examined by the national courts or in which the case has been dismissed on procedural grounds, without going into the substance of the case, would be left unanswered (as they would be rejected as inadmissible).

Regarding the Protocol no. 16, with its entry into force, aims not only to reduce the volume of cases pending before the Court, but also to promote the judicial dialogue between the highest national courts and the Strasbourg court. The institution of the advisory opinion is generally considered (Žuber & Lovšin, 2019) to have great potential for improving the understanding and compliance with ECHR standards at the national level. The possibility for national courts to seek an advisory opinion could prevent violations of human rights and fundamental freedoms because, in the absence of such a procedure, national courts have sometimes been obliged to interpret the Convention accordingly resulting in some vague interpretations. The use of the advisory opinion procedure would show that national courts can understand the complexity of the evolving case law of the ECHR and therefore identify potential questions of principle regarding the interpretation of ECHR standards. Secondly, not only would the Court's advisory opinion affect the decision in the case pending before the national court, but it would also contribute to the wider application of ECHR standards across Europe.

The ECHR's new advisory competence is designed to have persuasive authority not only for the national judge who applied for an advisory opinion, but also for other national courts that would face a similar situation. Thus, advisory opinions would have a long-term *erga omnes* effect and not just symbolic value (Gionnopoulos, 2015). This Protocol creates a platform for dialogue between the highest national courts and the ECHR, formalizing their relations and guiding their interactions, which have so far been subsumed under the rule of exhaustion of domestic remedies. As mentioned above, however, the Protocol is the result of a long period of reflection. However, there are voices (Zampetti, 2018) which calls for the role of each actor in this new institutional dialogue to be further defined for

the benefit of judicial certainty, given that no state can adhere to a mechanism beforehand without knowing the exact extent of its obligation. Far from questioning the need for a formal dialogue between national and European judges, it is appreciated (Ziółkowski & Paprocka, 2015) / that the goal of strengthening the interaction between the national and European levels is still far from being achieved, whereas, although this protocol is a valuable starting point for a better understanding of human rights at pan-European level, it is highly doubtful whether at this stage, it can give more strength to the European Convention on Human Rights.

Conclusions

Article 1 of the Protocol no. 15 on the subsidiarity and the margin of appreciation, even if in the end it has no practical impact, it reflects the real concerns on the part of some States about the jurisdiction of the Court and how it interprets and applies the Convention. Article 3 deals with an essential element of the compromise underlying Protocol No. 11 and further refines the mechanism for resolving claims to a single level of jurisdiction. Even Article 5, which modifies the admissibility criterion of significant damage, has its own significance, in that it strengthens a cause of inadmissibility which has traditionally helped to sort out the cases before the Court.

The protocol no. 16 (European Council, 2016) has of course a more obvious impact than the Protocol no. 15. Either way, it will create a significant change in the relationship between the Court and the domestic judicial system. If it had the expected effect, it could pave the way for further developments in the ECHR system, which could radically change the role of the Court. Behind these “main” legal instruments, however, there are much broader discussions on the relationship between the national authorities and the Strasbourg Court, as well as the extent of its control powers. On the one hand, the Convention is playing an increasingly important role as a “constitutional instrument of European public policy” (Milner, 2014, p. 42), the Court's developing case law, ensuring its continued relevance in the face of new challenges for the protection of the human rights, focusing the Court's role in this direction. On the other hand, this very evolution provokes debates on the actual limits of the role of an international judicial mechanism in relation to the democratic institutions of a sovereign state.

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