

PROTOCOLS 15 AND 16 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This review provides information on the recently adopted Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. It discusses the amendments it introduces for the ECHR system and the reactions to its adoption. The review calls on Macedonia to sign and ratify this Protocol, in view of assisting the efforts of the Council of Europe to remove existing obstacles for the effectiveness of the ECtHR. The review also discusses Protocol 16 - the next instrument in line which aims to facilitate the implementation of the ECHR at the domestic level.

The texts of two new protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, the Convention) have been prepared. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 15)¹ opened for signature on June 24, 2013. It was signed by 20 and ratified by 1 state thus far.² Macedonia is not yet among the signatories. In order to assist the efforts of the Council of Europe to remove existing obstacles for the effectiveness of the ECtHR, Macedonia should initiate and complete a procedure for signing and ratification of this Protocol. The Protocol will enter into force once all High Contracting Parties to the ECHR (HCP) complete the signature and ratification/acceptance/approval procedures (Art.6, Protocol 15). Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 16)³ will open for signature on October 02, 2013.

Both protocols are part of the ECHR system reform efforts, in view of realising an effective implementation of the ECHR and ensuring viability of the ECHR mechanism. Preceding steps included the adoption and entry into force of Protocol 14 and Protocol 14bis and the Interlaken (2010), Izmir (2011) and Brighton (2012) declarations.

HOW PROTOCOL 15 WILL CHANGE THE ECHR SYSTEM

Protocol 15 in a nutshell:

- The principle of subsidiarity and the doctrine of the margin of appreciation enter the ECHR Preamble;
- Upper age limit set for candidates for judges; and removal of the upper age limit for retirement;
- Objection to relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber no longer a possibility for the parties;
- Time limit for applications set at four months; and
- Changes in the 'significant disadvantage' part of the admissibility criterion.

1. Principle of subsidiarity and the doctrine of the margin of appreciation

References to the principle of subsidiarity and the doctrine of the margin of appreciation (MoA) were added to the ECHR Preamble. The principle of subsidiarity helps to maintain the position and the role of the ECHR system as one that needs to primarily be implemented at national level, by each HCP. Thus, the possibility of addressing the ECtHR can be open only after all domestic options have failed, which is why the Court cannot be seen as a court of third instance. The MoA is a long-debated subject. The Court has been applying it throughout the years, but it has also used it as a bail out in cases where it would need to make decisions, which might cross the subsidiarity line.

Singling out these two principles of interpretation (for example proportionality, dynamic and evolutionary interpretation, etc) could be a sign of worry; however, one can also understand this amendment as adding reassurance for the States that the already agreed position of the Court will remain unchanged in the ECHR system reforming process.

2. Upper age limit for candidates for judges increases upper retirement age

Under Protocol 15, a new requirement is that candidates for judges be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly.⁴ Given that judges serve a mandate of 9 years, they can stay in office up to the age of 74 as the retirement age is no longer set at 70. Protocol 15's Explanatory Report clarifies the aim of this amendment, as an effort to strengthen the consistency of the membership of the Court by allowing judges to serve a full nine-year term of office.⁵ There is no longer a retirement age for judges, which is justified with the non-renewable term of office. A positive effect on the domestic selection procedure is anticipated by this amendment, as it will help to avoid situations whereby a selected candidate cannot take office due to reached age limit in the course of the selection procedure.⁶

3. Objection to the relinquishment of jurisdiction to the Grand Chamber

Before Protocol 15, any of the parties could object the relinquishment of the jurisdiction by one of the Chambers to the Grand Chamber. This possibility no longer exists.

The Explanatory Report argues for this amendment with the claim it will accelerate the procedure and will contribute to the consistency of the ECtHR case law, making it obligatory for a Chamber to relinquish jurisdiction if a potential issue of departing from settled case-law arises.⁷

4. Time limit for applications drops to four months

The present time limit for submitting an application is six months following a final decision of the last instance domestic court. Protocol 15 decreases this limit to four months.

This is one of the changes introduced by Protocol 15 which are expected to have the largest negative impact on the possibility of parties to successfully bring cases to the ECtHR. Not only does it reduce the time to find appropriate legal team/council to work on the case, but it also decreases the time for the preparation of the application. Human Rights NGOs have also drawn attention to another potential negative impact of this amendment in some of the jurisdictions, namely in those with recurrent failure or a prolonged delay in notifying applicants of final domestic decisions.⁸ A reduction of this time period may have particularly detrimental effect in such cases.

5. Amended 'significant disadvantage' admissibility criterion

The 'significant disadvantage' admissibility criterion no longer contains the proviso that the case has been duly considered by a domestic tribunal. It is expected this will effectuate the principle *maxim de minimis non curat praetor*.

REACTIONS TO THE ADOPTION OF PROTOCOL 15

Majority of the reactions to Protocol 15 were on the amendment of the Preamble to the Convention, i.e. the introduction of the principle of subsidiary and the margin of appreciation in it. Phillip Leach considers this amendment as a normal continuation of CoE's general efforts to refer Human Rights issues back to the HCP and to make them resolve these issues when they arise. He also recalls the role that can and should be played by National Parliaments in the enforcement of ECHR obligations by the HCP.⁹

A joint statement by several international non-governmental organisations warns that Protocol 15 must not result in a weakening of the Human Rights protection.¹⁰ These organisations 'recall the principle that the Convention must be interpreted in accordance with its object and purpose, taking into account the nature of the Convention as a treaty for the effective protection of human rights.'¹¹ They express worry over the potential negative impact which Protocol 15 changes to the ECHR system might have, save the removal of the relinquishment of jurisdiction to the Grand Chamber.¹²

HOW PROTOCOL 16 WILL CHANGE THE ECHR SYSTEM

Based on a proposal initially contained in a 2005 report of the Group of Wise Persons to the Committee of Ministers, further considered in Izmir (2011) and formally proposed in Brighton (2012) another protocol of the ECHR was drafted - Protocol 16. It will open for signature on October 02, 2013. It is part of the efforts for addressing one of the most burning issues of the ECHR system - the domestic implementation of the ECHR.

Protocol 16 is an exciting new development to the ECHR, as it introduces the possibility for domestic courts or tribunals to seek advisory opinions from the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention and its protocols (Art. 1.1) in the context of cases pending before them (Art.1.2). The courts or tribunals designated to seek advisory opinions, as per this Protocol, shall be indicated by the HCP with a declaration accompanying the ratification/acceptance/approval instrument.

The request for an advisory opinion is firstly considered by a panel of five judges, who can accept or refuse the request, providing reasons for it (Art.2.1). Accepted requests are considered by a Grand Chamber (Art.2.2). In the process of compiling these opinions, the ECtHR can seek written comments (Art.3). The advisory opinions will not be binding (Art.5).

ENDNOTES

¹ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. CoE Treaty Office Website. <<http://www.conventions.coe.int/Treaty/EN/Treaties/Html/213.htm>>. Last accessed: 30.08.2013

² Protocol 15, State of Ratification as of 27.06.2013. CoE Treaty Office Website. <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=1&DF=&CL=ENG>>. Last accessed: 30.08.2013

³ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CoE Treaty Office Website. <<http://www.conventions.coe.int/Treaty/EN/Treaties/Html/Prot16ECHR.htm>>. Last accessed: 30.08.2013

⁴ Explanatory report Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. para.11

⁵ *Ibid.* para.12

⁶ *Ibid.* para.13

⁷ *Ibid.* paras.17-19

⁸ Joint NGO Statement - Protocol 15 to the European Convention on Human Rights must not result in a weakening of human rights protection'. Human Rights Watch Website. <http://www.hrw.org/sites/default/files/related_material/2013_Europe_Joint%20NGO%20Statement%20ECHR.pdf>. Last accessed: 30.08.2013

⁹ Phillip Leach, Interview for CoE News Journal - Week 26. CoE Website. <<http://webtv.coe.int/index.php#clip=601422&time=44.603>>. Last accessed: 30.08.2013

¹⁰ Joint NGO Statement - Protocol 15 to the European Convention on Human Rights must not result in a weakening of human rights protection'. Human Rights Watch Website. <http://www.hrw.org/sites/default/files/related_material/2013_Europe_Joint%20NGO%20Statement%20ECHR.pdf>. Last accessed: 30.08.2013

¹¹ *Ibid.*

¹² *Ibid.*

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