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STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

DRAFTING GROUP ON THE EVALUATION OF THE FIRST EFFECTS OF PROTOCOLS No. 15 AND No. 16 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(DH-SYSC-PRO)

Elements for a draft report on the first effects of Protocol No. 15 to the European Convention on Human Rights

Prepared by the Secretariat under the supervision of the DH-SYSC-PRO Chair

Note: This document aims to support the Group's consideration at its 1st meeting (26–28 March 2024) of the scope and structure of its draft report and the methodology for preparing it. The elements outline areas of inquiry into the effects of Protocol No.15 according to its key provisions, including possible unintended effects. They seek to formulate possible evaluation criteria based on the justification for and/or the intended aims of the amendments introduced by the Protocol as they have been stated therein or in its Explanatory Report.

I – Introduction

- Mandate of CDDH and DH-SYSC-PRO.
- Overview of amendments to the Convention introduced by Protocol No.15.
- Explanation of the evaluation methodology.

II – The doctrine of margin of appreciation and the principle of subsidiarity

1. Article 1 of the Protocol and its aims

Explanatory Report of the Protocol

"7. A new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law."

2. Transparency and accessibility of these characteristics of the Convention system

Quantitative analysis of the Court's case law since the entry into force of Protocol No.15 (1 August 2021) as regards references to the relevant preambular recital of the Convention. Has the Court used these concepts more or less often after the entry into force of the Protocol? In how many cases did the Court use specific phrases – e.g. narrow margin, certain margin, wider margin of appreciation?

Scope: Articles 8-11 of the Convention which provide expressly for limitations (Articles 1, 2 and 3 of Protocol No. 1)

Methodology: data collected by external expert/s to feed into the rapporteur/s' draft report.

3. *Consistency of the case law*

What was Protocol No. 15's influence on the Court's use of these concepts by the Court? How did the Court's conditions/ criteria for accepting that national authorities' decisions are compatible with the Convention evolve?

Overview of case-law, focusing on the following areas:

- The Court's examination of the quality of national legislative decision-making processes; highlighting the evolution, if applicable, of the procedural criteria for defining the level of deference to be afforded to States Parties established in the Animal Defenders International line of cases.[1]

- The Court's examination of the quality of national judicial decision-making processes; highlighting the evolution, if applicable, of the procedural criteria for defining the level of deference to be afforded to States Parties established in the Von Hannover (No. 2) line of cases.[2]

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[1] Animal Defenders International v. UK, no. 48876/08, 22 April 2013; Parillo v Italy, no. 46470/11, 27 August 2015; Lambert and others v France, no. 46043/14, 5 June 2015; S.A.S. v France, no. 43835/11, 1 July 2014

[2] Von Hannover v. Germany (No. 2), no. 40660/08, 7 February 2012; Ibrahim v. UK, App. Nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016; Bărbulescu v. Romania, no. 61496/08, 5 September. 2017; Ndidi v. UK, no. 41215/14, 14 September 2017.

Scope: Articles 8-11 of the Convention (Article 1 Protocol No. 1; Articles 2 and 3 of Protocol No.2?)

Methodology: preliminary research by external expert/s to feed into the rapporteur/s' draft report.

III – The age criteria for judicial appointment on the Court and for termination of office

1. Article 2 of the Protocol and its aims

   Explanatory report of the Protocol

   "12. This modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the membership of the Court. The age limit applied under Article 23, paragraph 2 of the Convention, as drafted prior to the entry into force of this Protocol, had the effect of preventing certain experienced judges from completing their term of office. It was considered no longer essential to impose an age limit, given the fact that judges' terms of office are no longer renewable.

   13. The process leading to election of a judge, from the domestic selection procedure to the vote by the Parliamentary Assembly, is long. It has therefore been considered necessary to foresee a date sufficiently certain at which the age of 65 must be determined, to avoid a candidate being prevented from taking office for having reached the age limit during the course of the procedure. For this practical reason, the text of the Protocol departs from the exact wording of the Brighton Declaration, whilst pursuing the same end. It was thus decided that the age of the candidate should be determined at the date by which the list of three candidates has been requested by the Parliamentary Assembly. In this connection, it would be useful if the State Party's call for applications were to refer to the relevant date and if the Parliamentary Assembly were to offer a means by which this date could be publicly verified, whether by publishing its letter or otherwise."

2. Quantitative analysis of the effects of the removal of the upper-age limit (70 years of age) – number of judges elected before the entry into force of the Protocol whose terms of office ended due to them reaching the age of 70; number of judges elected after the entry into force of the Protocol who reached 70 years of age during their term of office.

   Sources of information: data from the Registry.

IV. Relinquishment of jurisdiction by the Chamber in favour of the Grand Chamber

1. Article 3 of the Protocol and its aims

   Explanatory report of the Protocol:

   "16. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law (1). Removal of the parties' right to object to relinquishment will reinforce this development.

17. The removal of this right would also aim at accelerating proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto or a potential departure from existing case-law.

18. In this connection, it would be expected that the Chamber will consult the parties on its intentions and it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.

19. This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto."

2. Quantitative and, as appropriate, qualitative analysis of the Court's practice regarding the relinquishment of jurisdiction. In which ways did the removal of the parties' right to object to the relinquishment;

   i. accelerate proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto (e.g. number of cases before the entry into force of Protocol No.15 in which a Chamber did not relinquish jurisdiction in favour of Grand Chamber due to objections by the parties to the cases and in which the Grand Chamber later overturned the Chamber judgment. This number is expected to indicate the degree of delay to which proceedings would have been exposed in the absence of Protocol No.15. Number of cases after the entry into force of Protocol No.15 in which there was relinquishment of jurisdiction; this number is expected to indicate the efficiency of the relinquishment procedure).

   ii. accelerate proceedings before the Court in cases which raised a potential departure from existing case-law and reinforce the consistency of the case-law of the Court?

3. Did the removal of the parties' right to object create additional case-load for the Grand Chamber?

4. Analysis of Chamber decisions disposing of part of an application by means of an admissibility decision followed by relinquishment in favour of the Grand Chamber.

5. Analysis of the Court's practice on (a) a Chamber's consultation with the parties to relevant cases regarding its intentions to relinquish the case; and (b) on information provided by the Grand Chamber on the potential departure from existing case-law or the serious question of interpretation of the Convention or the Protocols thereto that has prompted the relinquishment.

Sources of information: Court's case law and practice from 1 November 1998 (entry into force of Protocol No. 11 which introduced Article 30 of the Convention until 1 August 2021 and after that date; data from the Registry.

Methodology: data collected by external expert/s to feed into the rapporteur/s' draft report.

V. Admissibility criteria

1. Article 4 of the Protocol and its aim

   Explanatory report of the Protocol:

   "21. […] Paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final domestic decision within which an application must be made to the Court. The development of swifter communications technology, along with the time limits of similar length in force in the member States, argue for the reduction of the time limit."

2. Analysis of number of inadmissibility decisions on the ground of not respecting the four months deadline, comparison with number of inadmissibility decisions before the entry into force of Protocol No.15. Analysis of whether there has been a reduction in the number of incoming applications, including on a country-by-country basis, and an increased efficiency in the processing of incoming applications by the Court, including by facilitating the electronic submission of applications, as well as in dealing with the overall backlog of cases pending before the Court.

   Sources of information: Court's statistical data on cases before and after 1 February 2022 (taking into account any possible adjustments due to measures relating to Covid-19 pandemic)

   Methodology: data collected by external expert/s to feed into the rapporteur/s' draft report.

3. Adjustment of the significant disadvantage admissibility criterion by removing the safeguard requiring prior due consideration by a domestic tribunal.

3.1. Article 5 of the Protocol and its aim

   Explanatory report of the Protocol:

   "23. Article 35, paragraph 3.b of the Convention, containing the admissibility criterion concerning "significant disadvantage", has been amended to delete the proviso that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give greater effect to the maxim *de minimis non curat praetor* (1)."

3.2. Analysis of the number of cases in which the Court has considered this element of Article 35(3) (b), applied it and rejected applications based on it after 1 August 2021; comparison with data on number of cases rejected on the basis of the same provision of the Convention before the entry into force of Protocol No. 15 (i.e. starting from the entry into force of Protocol No.14 which introduced Article 35(3)(b) of the Convention until 1 August 2021).

   Sources of information: Court's case law and practice.

   Methodology: data collected by external expert/s to feed into the rapporteur/s' draft report.

VI – Conclusions