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Protocol 16 ECHR. Context, meaning, effects and experiences

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Summary

Background

On 1 August 2018, Protocol 16 (hereinafter also referred to as 'Protocol') to the European Convention on Human Rights (ECHR) entered into force. Five years later, the Protocol has been ratified by 19 of the 46 member states of the Council of Europe, including the Netherlands. In the countries that have ratified the Protocol, designated highest courts can apply to the European Court of Human Rights (ECtHR) for an advisory opinion on the interpretation or application of the ECHR in a pending case. This advisory opinion procedure aims to strengthen the dialogue between national highest courts and the ECtHR, thereby enhancing the protection of ECHR rights at the national level. It is also considered that the number of complaints to the ECtHR can be reduced when the ECHR already can be applied correctly at the national level.

So far, the Dutch courts with competence to request an advisory opinion (the Supreme Court, the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal, the Appeals Tribunal for Trade and Industry and the Joint Court of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba) have not made use of the possibility to request an advisory opinion from the ECtHR. This is different for judges in other states. Since the entry into force of Protocol 16 (and until 1 June 2023), eight requests for an advisory opinion have been submitted by states that have ratified the Protocol. This has so far resulted in six advisory opinions from the ECtHR, namely in response to two requests from Armenia, two from France, one from Lithuania and one from Finland. In one case, the ECtHR refused to consider the request. This request was made by a Slovakian court. On 16 May 2023, the ECtHR announced that a new request for an advisory opinion had been accepted for consideration, namely a request made by the Belgian Council of State.

This research focuses on identifying and analysing first experiences with the Protocol at the national level. More specifically, the question has been posed by the Research and Documentation Centre (WODC) as to **how Protocol 16 ECHR has been implemented and applied so far and whether its use can be improved**.

Research approach

To answer the research question, the background and objectives of the Protocol, the organisation of the advisory procedure and the current application of the Protocol by the ECtHR have been researched. In addition, possible explanations for the limited signing and ratification of the Protocol have been examined. To this end, experts and governmental stakeholders from six states, among others, have been asked to complete a qualitative questionnaire. Finally, research has been conducted into how the opportunities offered by the Protocol are being used both within and outside the Netherlands and into courts' experiences with the advisory procedure to date. Semi-structured interviews have been held with judges, an advocate-general and members of the registry at the five highest courts in the Netherlands competent to submit a request for an advisory opinion. Similarly, interviews have been conducted with judges, court clerks and/or advocate generals at the foreign courts that have submitted requests for an advisory opinion.

The present study has focused on ratification and application practices until 1 June 2023. This means that the evaluation is made just five years after the Protocol's entry into force. As a result, the data available for drawing conclusions is relatively limited. In addition, the study only covers national experiences with the advisory opinion procedure and the interpretation given by the ECtHR to the advisory opinion procedure in the opinions issued so far. The (perceived) consequences of Protocol 16 for the practice of the ECtHR are therefore beyond the scope of this study.

Evaluation in the light of the objectives of Protocol 16

An important aim of the study was to evaluate the implementation and application of Protocol 16 so far. This evaluation was carried out in light of the two main objectives of the Protocol: (1) to strengthen the dialogue between highest national courts and the ECtHR and thereby achieve better implementation of the ECtHR and (2) to increase the efficiency of the ECtHR.

Dialogue function

The study of the ratification process at the national level showed that there is **much debate about the consequences of Protocol 16 for the relationship between national and European judges and for the implementation of the ECHR**. In quite a few ratification debates, concerns have been expressed that the procedure could result in the ECtHR becoming too involved in national fundamental rights issues. As a consequence, in some states it is felt that Protocol 16 is at odds with national sovereignty and the national primary power to interpret the ECHR. To some extent, this also seems to be a consideration among some Dutch judges. Several respondents at the Dutch highest courts indicated that it is primarily up to them to interpret and apply national law. For some judges, this makes them reluctant to use the Protocol, even though they value the ideas behind it.

At the same time, **all Dutch and foreign judges acknowledge the value and significance of the Protocol when it comes to new legal questions that go to the heart of a case presented and on which there is no clear ECtHR case law yet**. Not only does the procedure then make it easier to give a proper judgment in national proceedings, it also prevents individual complainants from having to go to Strasbourg at a later stage to obtain clarity on the interpretation of the ECHR.

An argument that was hardly presented by Dutch judges, but all the more often by foreign respondents, is that **the Protocol allows the ECtHR to provide extra legitimacy in relation to questions that lead to strong ((legal-)political) controversy at the national level**. Importantly, doing so is not one of the express aims of Protocol 16, nor is this function easily compatible with the notion of subsidiarity. The ECtHR itself has so far seen no reason to reject requests for an advisory opinion if they are clearly related to a national (legal) political issue. However, in such cases it has opted for a purely legal approach, leaving aside the political aspects of the matter. It is not inconceivable that it is thereby implicitly trying to make clear that the procedure is not aimed at resolving national political issues. However, without further research at the ECtHR, this remains somewhat speculative.

In sum, on the basis of the limited number of opinions requested and issued so far, **it cannot be concluded unequivocally whether the advisory procedure contributes positively to the**

implementation of the ECHR at the national level and to increasing dialogue between national and EU courts.

Efficiency function

The study further has found that **the efficiency function of Protocol 16 can be seriously doubted**. In many ratification debates, it was expressly questioned that the procedure could lead to a reduction of the number of individual applications lodged at the ECtHR. Quite to the contrary: according to many stakeholders, the handling of requests for advisory opinions might put a considerable strain on the already limited capacity of the ECtHR, as the requests must always be handled by the Grand Chamber. Dutch judges have indicated that this is indeed a relevant consideration when it comes to submitting a request for an advisory opinion.

The submitted requests further show that these are not about issues that are central to a large number of similar, pending cases. Rather, they concern unique cases with a political character or issues concerning very specific ambiguities in existing ECtHR jurisprudence. Many Dutch respondents in the highest courts do indicate that they see the added value of the procedure if it concerns an issue that is the subject of much litigation. Nevertheless, for them it is ultimately always the question whether a request for an advisory opinion is really necessary to obtain clarity in the case at hand. Whether the advisory procedure could lead to efficiency gains in the future is therefore uncertain at present.

Towards an improved use of Protocol 16?

In addition to evaluating the implementation and application of Protocol 16 so far, the research has focused on whether the possibilities of the Protocol could be used more fully in the future.
Interviews with the Dutch highest courts have revealed that **it is partly practical considerations that stand in the way of submitting requests for advisory opinions. At the same time, these seem to be surmountable**. Judges have indicated, for example, that it will be a challenge to formulate a request in such a way that a useful and meaningful advice follows. At the same time, they have stated that there is enough experience with the preliminary ruling procedure and sufficient knowledge of the ECHR to formulate good requests. Similarly, internal regulations or protocols are lacking as yet, but there is a willingness to create them and to consult with other judges if a request for an advisory opinion is considered. Concerns about long processing times and possible delays can also be put into perspective: at present the duration of the advisory opinion procedure is shorter than the preliminary rulings procedure at the Court of Justice of the European Union (CJEU). As such, practical concerns do not have to stand in the way of submitting a request for an advisory opinion. However, based on experiences in other states, there appears to be room for improvement when it comes to the way in which the ECtHR deals with the procedure, especially when it comes to communication with the national courts.

In addition, a number of criteria of a more substantive nature can be formulated that have to be met to benefit from the possibilities of submitting a request for an advisory opinion. These criteria are related to the expected added value of an ECtHR advisory opinion and its perceived costs. The criteria listed below are strongly supported by both the Dutch respondents and the foreign judges; the latter indicated that they have either already directly taken these criteria into account in their decision to file a request for an advisory opinion or plan to do so (even better) in the future. Arguably, **there is value in submitting a request for an opinion under Protocol 16 if the following four criteria are met**:

1. Obtaining a clear ECtHR interpretation has real added value for the pending case (and possibly similar cases pending before lower courts). There may be added value, for example, if there is contradictory or inconsistent ECtHR case law on the matter at hand or if there is only limited ECtHR case law on a particular issue. The latter may occur, inter alia, in the case of new legal questions that the ECtHR has not yet been able to address, such as technological issues or new investigation methods.
2. A case raises a general question of explanation which cannot be answered even on the basis of careful analysis of ECtHR case law and which is 'translatable' easily enough to a request for an opinion. Also relevant is whether the case has a certain 'radiance effect', in the sense

that the answer to the request for an opinion is relevant to a larger number of cases (at home and abroad).
3. The ECHR issue constitutes a core aspect of the case.
4. There are no EU law aspects to the case; if there are, the preliminary ruling procedure at the CJEU is preferred.

These four criteria fit well with the aforementioned main objectives of the Protocol. Moreover, they fit the division of tasks between national judges and the ECtHR and between the ECtHR and the CJEU. There is therefore every reason to make these criteria the starting point for the future. Perhaps this will not lead to a much higher number of requests for an advisory opinion, but that is not an end in itself either. **However, taking these criteria into account does mean that requests for an advisory opinion will be made where it adds value and is appropriate.**