EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar

Judicial dialogue through the advisory opinion mechanism under Protocol No. 16

Speech by Síofra O'Leary

Strasbourg, 13 October 2023

Secretary General,
Superior Court Presidents,
Distinguished speakers,
Colleagues and friends,

It is an honour, as President of the Court, to launch today's seminar on Protocol No. 16 and, on behalf of the Court, let me extend a very warm welcome to you all.

I would also like to thank those within the Court who have played key roles in the organisation of today's seminar, not least Judge Carlo Ranzoni, Stefano Piedimonte, Rachael Kondak, Valérie Schwartz and Tatiana Kirsanova from the Registry. Our thanks also to the Irish ambassador and permanent representation for supporting this event and the multi media provided.

Ten years ago Protocol No. 16 was opened for signature and last August marked five years since its entry into force.

This is why we, at the Court, felt it was an opportune moment to gather together superior Court presidents to take stock of how the mechanism is operating in practice and reflect on how we see it develop in the future.

To date, 22 States have ratified Protocol No. 16 and three States have signed but not yet ratified it.[1]

Eight requests for advisory opinions have been lodged by eight different superior courts: the French Court of Cassation; the Armenian Constitutional Court; the Supreme Administrative Court of Lithuania, the Slovak Supreme Court, the French *Conseil d'État*, the Supreme Court of Finland and the *Conseil d'État* of Belgium. Six opinions have been issued, one request was refused, and the latest Belgian request is currently pending.[2]

I am very pleased that today we are joined by around 30 judges, as well as court staff and Ambassadors, from those States who have ratified Protocol No. 16, as well as from those which have not. The idea is to exchange lived experiences and ideas for improvement.

[1] Full list - Treaty Office (coe.int) – see list in Annex to this speech
[2] Advisory opinions - ECHR Case-Law - ECHR - ECHR / CEDH (coe.int)

As we all know, one of the main aims of the Court's advisory jurisdiction under Protocol No. 16 was to enhance the interaction between the Court and national authorities. The Protocol is intended to reinforce the implementation of the Convention at national level in accordance with the principle of subsidiarity.[3]

Underpinning the rationale behind the advisory opinion procedure is the idea that it could help *prevent* violations of the Convention, by assisting national courts and authorities in their interpretation of the Convention within their national legal orders.

It was hoped that the mechanism could create more opportunities for judicial dialogue where the requesting court can express its own view of the legal question at issue and express any concern about a particular line of case-law or a perceived lack of clarity or consistency therein. In the medium to long term, it was also hoped that this procedure could help to diminish the Court's docket of pending cases – which stands at over 75, 000 – by clarifying standards and providing case-law guidance.[4]

Turning to the six advisory opinions delivered so far.

These have concerned issues ranging from:

- the legal recognition of the parent-child relationship for a child born through gestational surrogacy abroad;[5]
- the use of the "legislation by reference" technique in criminal law;[6]
- impeachment legislation;[7]
- the applicability of statutes of limitation;[8]
- the entitlements of landowners' associations,[9] and
- proceedings for the adoption of an adult.[10]

Protocol No. 16 is sometimes referred to as "the dialogue Protocol" and we are encouraged by the judicial dialogue that has occurred through the mechanism thus far.

As I have just demonstrated, the requests received have engaged with a broad range of subjects.

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[3] See Preamble of Protocol No. 16. Protocol No. 15 added a new recital to the European Convention preamble as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the [ECHR] […]".

[4] S. O'Leary, "Advisory Opinions and Judicial Dialogue Strasbourg-Style" (2022) 59 Common Law Market Review SI, 87-104, 89.

[5] France's first request: *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

[6] Armenia's first request: *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020.

[7] Lithuania's request: *Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022.

[8] Armenia's second request*: Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022.

[9] France's second request: *Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date* [GC], request no. P16-2021-002, French Conseil d'État, 13 July 2022.

[10] Finland's request*: Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult* [GC], request no. P16-2022-001, Supreme Court of Finland, 13 April 2023.

They have also enabled the Court to clarify and delimit the exercise of its own new non-contentious jurisdiction.

For example, as Judge Eicke will explain, in its first advisory opinion, which concerned a French case on surrogacy, the Court emphasised that the mechanism is not designed to transfer the dispute to the Strasbourg Court, but rather to give the requesting court or tribunal interpretative guidance on Convention issues when it subsequently determines the concrete case pending before it.

Moreover, the opinions furnished by the Court will be confined to the issues directly connected to the pending domestic proceedings. In that first advisory opinion therefore, the Court did not draw broader conclusions about different kinds of surrogacy arrangements, but instead focused on the specific type of surrogacy arrangement at issue in the case pending before the requesting court. [11]

Other examples of how we have developed our Protocol No. 16 jurisdiction and the limits thereto will no doubt arise during the course of our discussions.

When it comes to the impact of advisory opinions, it is important to recognise that although not binding, these opinions do nevertheless have jurisprudential authority and value, a point which will be explored by Professor Albanesi. They are after all issued by the Court's most solemn judicial formation of 17 judges.

Advisory opinions form part of the case law of the Court, alongside its judgments and decisions and can therefore be referred to by the Court in subsequent contentious proceedings.[12]

In addition, we are seeing examples of the influence of advisory opinions in States which have not ratified the Protocol. In its 2022 annual report, for example, the Swedish Supreme Court included an example of a surrogacy case of which it was seised in which that court had referred to our first advisory opinion in the French case. The Swedish Supreme Court recognised that advisory opinions may be deemed to have "a significant value as a legal source in conjunction with the interpretation" of the Convention. The President of the Italian Constitutional Court provided a similar example in Italy in her speech at the opening of this judicial year.

We know there are a wide array of factors that may encourage or discourage national Courts' engagement with the advisory opinion mechanism.[13]

For example, there may be concern that referring a question to the Strasbourg Court would lead to delays in the national proceedings.[14]

We understand that time is of the essence in deciding these requests and our track record so far has been quite positive, Covid notwithstanding. The last opinion, like the first, was delivered in approximately six months. The time frame is shorter than the average time taken to hand down Grand Chamber judgments in contentious proceedings, and we will continue to strive to be responsive.

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[11] France's first request, cited above, §§ 25–30.

[12] Explanatory Report to Protocol No. 16, § 27.

[13] See, for example, Gerards, J.H., Loven, C.M.S., Buyse, A.C., Erken, E., "Protocol 16 EVRM - Achtergronden, betekenis, effecten en ervaringen" (2023) Universiteit Utrecht - Montaigne Centrum voor Rechtsstaat en Rechtspleging.; Albansi, E., "The European Court of Human Rights' Advisory Opinions legally affect non-ratifying States: a good reason (from a perspective of constitutional law) to ratify Protocol no. 16 to the European Convention" (2022) European Public Law 28(1), 1-17.; Glas, L., "A Strasbourg story of swords and shields: national courts' motives to request an advisory opinion from the European Convention under Protocol 16" (2022) European Convention on Human Rights Law Review 3(3), 311-349.

[14] Glas, L., "A Strasbourg story of swords and shields: national courts' motives to request an advisory opinion from the European Convention under Protocol 16", cited above, 323.

Additionally, we know that many courts may see the process of requesting an advisory opinion as creating more work for you.[15] There is a balance to be found here, as we do not wish the requirements for requests to deter your engagement, while we also must ensure that the information provided places the Court in the best possible position to provide appropriate and useful interpretative guidance. These issues will be tackled in her intervention by Judge Koskelo. The updated guidelines for national courts, which will be published following this Seminar, seek to assist in this regard.

When it comes to factors encouraging ratification of the Protocol, submitting advisory opinion requests provides an opportunity to set an issue on the Strasbourg agenda,[16] and as we will hear from Professor Albanesi, is also a chance to shape the case-law emerging from this mechanism.

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Un excellent programme nous attend ce matin.

Notre première session a pour but d'envisager le Protocole n° 16 sous différentes perspectives. Nous avons la chance d'accueillir, pour animer cette discussion, Mme la juge Schembri Orland, à laquelle se joindront trois intervenants : M. le juge Eicke; Président Accetto, de la Cour constitutionnelle de la Slovénie, et Professeur Albanesi, de l'Université de Gênes.

Notre seconde session, qui sera axée sur les enseignements concrets que nous pouvons tirer de l'expérience des premiers avis consultatifs, sera animée par Mme la juge Mourou-Vikström, et nous permettra d'entendre deux intervenants : Mme la juge Koskelo, et le Premier président de la Cour de cassation française, M. Christophe Soulard. Il s'agit de la première juridiction à avoir saisi la Cour d'une demande d'avis consultatif.

Nous les remercions tous pour leur présence.

Je ne doute pas que les discussions d'aujourd'hui seront productives et fructueuses. Nous partageons le même objectif de renforcer notre capacité à servir les peuples d'Europe grâce au système de la Convention.

Il est important de souligner que les séances de questions-réponses ne seront ni enregistrées ni publiées, à la différence des présentations officielles. L'idée est de ménager un espace dans lequel nous pourrons en toute confidentialité échanger des idées sur le fonctionnement du mécanisme d'avis consultatif, tout en donnant au grand public et aux juges nationaux, qui ne sont pas présents aujourd'hui, l'accès aux documents qui nourriront nos échanges.

Avant de vous donner la parole, Madame la Secrétaire générale du Conseil de l'Europe, permettez-moi de vous remercier d'avoir trouvé dans votre agenda le temps de vous joindre à nous pour cette session introductive.

Tant le Conseil que la Cour, sa branche judiciaire indépendante et autonome, défendent trois valeurs fondamentales : les droits de l'homme, l'état de droit et la démocratie.

Aujourd'hui, à l'heure où nous traversons une période de fortes turbulences, agitée de multiples conflits non seulement sur le sol européen mais aussi plus loin de chez nous, nos missions respectives, sont plus difficiles à exercer mais plus importantes que jamais.

[15] ibid 325.
[16] ibid 348.

Je vous remercie donc d'être venue manifester ainsi votre intérêt et votre engagement à l'égard de la Cour et de notre Protocole du dialogue.

Mme le Secrétaire Général, vous avez la parole.

Ratified

1. Albania
2. Andorra
3. Armenia
4. Azerbaijan
5. Belgium
6. Bosnia and Herzegovina
7. Estonia
8. Finland
9. France
10. Georgia
11. Greece
12. Lithuania
13. Luxembourg
14. Montenegro
15. Netherlands
16. North Macedonia
17. Republic of Moldova
18. Romania
19. San Marino
20. Slovak Republic
21. Slovenia
22. Ukraine

Signed but not ratified

1. Italy
2. Norway
3. Türkiye

States that have neither signed nor ratified Protocol 16 are:

1. Austria
2. Bulgaria
3. Croatia
4. Cyprus
5. Czech Republic
6. Denmark
7. Germany
8. Hungary
9. Iceland
10. Ireland
11. Latvia
12. Liechtenstein
13. Malta
14. Monaco
15. Poland
16. Portugal
17. Serbia
18. Spain
19. Sweden
20. Switzerland
21. United Kingdom