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

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

The academic's perspective

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Strasbourg, 13 October 2023

1. Protocol No. 16 to the European Convention on Human Rights and Controversial Issues of Constitutional Nature

My presentation will be that of an academic, who is a constitutional lawyer. For these reasons, the presentation will be mainly carried out from a theoretical perspective and will focus especially on the impact on Contracting States' constitutional law.

Most of the Contracting States to the European Convention on Human Rights (ECHR) have not signed or ratified Protocol No. 16 to the ECHR. That is due to the controversial issues of constitutional nature arising from the advisory opinions that the European Court of Human Rights (ECtHR) would be tasked with giving to the requesting highest domestic courts or tribunals under the Protocol itself: in those States, huge concerns about the threat to national sovereignty and judicial discretion, have arisen.

There are several counter-arguments in favour of the ratification of Protocol No. 16 that can be considered. First, advisory opinions are not legally binding on those courts or tribunals that required them, thus they cannot jeopardise either the sovereignty of the States nor judicial discretion. Secondly, even if one considered advisory opinions as *de facto* binding (as it might be difficult to disregard the opinion of the ECtHR), the requiring court or tribunal would keep enough margin of discretion, because advisory opinions concern questions of principle[1].

However, if one considers advisory opinions as *de facto* binding, it is true that they may be perceived by the highest domestic courts or tribunals as being a possible threat to their autonomy, especially when it comes to domestic Constitutional Courts. When a request for advisory opinion would actually imply a matter of compatibility of a national law with the ECHR, thus, the Constitutional Court could choose merely to follow the opinion (although, as noted, just with regards to questions of principle): therefore, this would confirm a pure loss in terms of interpretative powers regarding the assessment of compliance of national legislation with the Convention[2].

Unlike the other aforementioned weak arguments, this argument against the ratification of Protocol No. 16 deserves attention. However, those States which are reluctant to ratify Protocol No. 16 due to the

[1] E. ALBANESI, *Corte costituzionale e parere della Corte europea dei diritti dell'uomo tra questioni di principio e concretezza del giudizio costituzionale*, Giappichelli, 2021, pp. 119-159.

[2] G. ZAMPETTI, *The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European level of protection,* Discussion Paper No. 2/18 – Europa Kolleg Hamburg, Institute for European Integration, September 2018, pp. 25-26 available on https://www.europa-kolleg-hamburg.de/wp-content/uploads/2018/10/DP_02-18_Giovanni-Zampetti.pdf

aforementioned controversial issues, apparently did not realize that advisory opinions under Protocol No. 16 already legally affect *all* Contracting States to the ECHR, including those which have not ratified the Protocol.

2. Demonstrating the Hypothesis: 'Vertical' Non-Binding Effect and 'Horizontal' Legal Effect of Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights

The hypothesis I would demonstrate is that advisory opinions of the ECtHR under Protocol No. 16, although non-legally binding on the requesting court or tribunal of ratifying States, somehow legally affect *all* Contracting States to the ECHR, including those which have not ratified the Protocol. This hypothesis can be demonstrated conceptualizing the notion of 'vertical' non-binding effect of advisory opinions and the notion of their 'horizontal' legal effect. From a wider perspective of constitutional law, I will then argue that the producing of the aforementioned 'horizontal' effect constitutes a good reason for States to ratify Protocol No. 16 in light of judicial dialogue[3].

If one reads the *Reflection Paper* (2012) of the ECtHR on the proposal to extend the Court's advisory jurisdiction, they would read that 'Despite the fact that its advisory opinions would not be formally binding on the domestic courts, the Court itself should consider them as valid case-law which it would follow when ruling on potential subsequent individual application'. In other words, 'Despite the fact that advisory opinions would not have the binding character of a judgment in a contentious case, they would thus have "undeniable legal effects"' [4].

More significantly, the *Explanatory Report* (2013) of Protocol No. 16 clearly reads that advisory opinions would have no direct effect on other later application but they would 'form part of the case-law of the Court, alongside its judgments and decisions'. Moreover, the interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be 'analogous in its effect to the interpretative elements set out by the Court in judgments and decisions'[5].

After all, in theory advisory opinions of international courts or tribunals are 'authoritative but usually nonbinding statements or interpretations of international law' and 'less confrontational than contentious cases': they are said to be 'soft' law because they are not binding and must encourage, but not compel, States to behave in a certain manner[6]. However, if one looks at the experience of advisory opinions of the International Court of Justice[7], the Inter-American Court of Human Rights[8] and the African Court of Human and People's Rights[9], they would realize that advisory opinions have been used by the Courts to impose binding obligations on States through their development of international custom and treaty norms, because advisory opinions often interpret binding customs and treaty norms[10].

Thus, from what has been said here so far, it is possible to conceptualize two different types of effects arising from advisory opinions of the ECtHR.

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[3] E. ALBANESI, *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 ECHR,* in *European Public Law,* 2022, No. 1, pp. 1-17.

[4] *See* European Court of Human Rights – Cour Européenne des Droits de l'Homme, *Reflection Paper on the proposal to extend the Court's advisory opinion*, March 2012, No. 3853038, paragraph 44, available on https://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf

[5] *See* Council of Europe, *Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 2013, paragraph 27, available on https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf

[6] J.C. SCHMID, *Advisory Opinions on Human Rights: Moving beyond a Pyrrhic Victory,* in *Duke Journal of Comparative & International Law*, 2006, p. 415.

[7] M.-C. RUNAVOT, *La fonction consultative de la Cour internationale de justice,* in A. Ondoua, D. Symczak (eds.), *La fonction consultative des juridictions internationales*, Pedone, 2009, pp. 21-45.

[8] L. BURGORGUE-LARSEN, *Advisory jurisdiction,* in L. Burgorgue, L.-A. Ubeda de Torres (eds.), *The InterAmerican Court of Human Rights*, Oxford University Press, 2011, pp. 84-103; H. TIGROUDJA, *La fonction consultative de la Cour Interaméricaine des droit de l'homme*, in A. Ondoua, D. Symczak (eds.), *supra* n. 7, pp. 67-85; M. DASCOLA, C. FASONE, I. SPIGNO, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System,* in *German Law Journal,* 2015, No. 6, pp. 1419-1421.

[9] A. ONDOUA, *La fonction consultative de la Cour Africaine des droits de l'homme,* in A. Ondoua, D. Symczak (eds.), *supra* n. 7, pp. 115-116.

[10] J.C. SCHMID, *supra* n. 6, p. 453.

First, 'vertical' non-binding effect of advisory opinions of the ECtHR, i.e., whose effects regard the requesting court or tribunal of those States that have ratified Protocol No. 16. Under its Article 5 'Advisory opinions shall not be binding' and this provision clearly means that advisory opinions shall not be binding on the requesting court or tribunal of those States that have ratified the Protocol. This effect has been called 'vertical' here because it regards *domestic* courts and tribunals.

Secondly, 'horizontal' legal effect, i.e. that 'undeniable legal effect' which arises from the fact that advisory opinions 'form part of the case-law of the Court, alongside its judgments and decisions' and in the light of which the interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be 'analogous in its effect to the interpretative elements set out by the Court in judgments and decisions' (see *Reflection Paper* and *Explanatory Report*). That effect has been called 'horizontal' here because it regards the ECtHR itself: to quote the *Reflection Paper*, the ECHR 'would follow [that case-law] when ruling on potential subsequent individual application'.

Therefore, advisory opinions of the ECtHR under Protocol No. 16, although non-legally binding (i.e. 'vertical' effect), legally affect *all* Contracting States to the ECHR, including those which have not ratified the Protocol, because they 'form part of the case-law of the Court, alongside its judgments and decisions' (i.e. 'horizontal' effect) and because the case-law of the Court legally affect *all* the Contracting States to the ECHR.

3. Conclusion: an Argument against the Ratification of Protocol No. 16 that Turns Surprisingly into an Argument in Favour of its Ratification, in Light of Judicial Dialogue

My conclusion is that in producing of the aforementioned 'horizontal' effect there constitutes a good reason for States to ratify Protocol No. 16 in light of judicial dialogue: as mentioned, non-ratifying States would be affected by advisory opinions anyhow, as valid case-law of the ECtHR, but at the same time there would be no opportunity for their highest courts or tribunals to contribute in creating via judicial dialogue (i.e., by requesting advisory opinions) that case-law. On the contrary, the ratification of Protocol No. 16 would allow the highest courts or tribunals to request advisory opinions, thus to have a dialogue with the ECtHR and to contribute in creating that case-law (as *mutatis mutandis* the actual experience of preliminary references by Constitutional Courts to the European Court of Justice has demonstrated).

For many years, Constitutional Courts were reluctant to engage in a dialogue with the European Court of Justice via preliminary ruling procedure, because they used to perceive it as a potential threat to their autonomy: Constitutional Courts such as the Italian Constitutional Court, the Spanish Constitutional Tribunal and the German Constitutional Tribunal changed their mind upon this issue respectively only in 2008[11], in 2011[12] and in 2014[13], when they started understanding that they could directly dialogue with the European Court of Justice, thus influence its case-law, and started getting out from that splendid isolation they had secluded themselves in[14].

At the end of the day, the argument against the ratification of Protocol No. 16 relying on the potential threat to the autonomy of the highest courts and tribunals would surprisingly turn into an argument in favour of its ratification.

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[11] Italian Constitutional Court, Order No. 103/2008. *See* O. POLLICINO, *The Italian Constitutional Court and the European Court of Justice: a Progressive Overlapping between the Supranational and the Domestic Dimension,* in P. Popelier, A. Mazmanyan, W. Vanderbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance,* Intersentia, 2013, pp. 101-129.

[12] Tribunal Constitucional, auto 86/11. *See* M. RODRÍGUEZ-IZQUIERDO SERRANO, *The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference,* in *German Law Journal*, 2015, No. 6, pp. 1509-1528.

[13] 134 BVerfGE 366. *See* E. LOHSE, *The German Constitutional Court and Preliminary References – Still a Match not Made in Heaven?,* in *German Law* Journal, 2015, No. 6, pp. 1491-1508.

[14] M. BOBEK, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts*, in M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds.), *Constitutional Conversations in Europe,* Intersentia, 2012, p. 287 and 304.