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МЕХАНИЗМ КОНСУЛЬТАТИВНЫХ ЗАКЛЮЧЕНИЙ В ЕВРОПЕЙСКОМ СУДЕ ПО ПРАВАМ ЧЕЛОВЕКА: ПРЕЛЮДИЯ К УСТАНОВЛЕНИЮ ХРУПКОГО БАЛАНСА В ОТНОШЕНИЯХ МЕЖДУ ФРАНЦУЗСКИМИ И ЕВРОПЕЙСКИМИ СУДЬЯМИ

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Протокол № 16 к Европейской конвенции о защите прав человека и основных свобод, вступивший в силу 1 августа 2018 г. после его ратификации Францией, расширил компетенцию Страсбургского суда выносить консультативные заключения по просьбе высших судов или трибуналов договаривающихся сторон. Этот новый механизм направлен на расширение взаимодействия между европейскими судьями и национальными органами власти и на активизацию реализации положений упомянутой конвенции в соответствии с принципом субсидиарности. Тем не менее новая процедура содержит некоторые противоречия. Ее анализ, а также анализ первого консультативного заключения, представленного по просьбе французского Кассационного суда, поднимает ряд вопросов относительно реального уважения национальной свободы усмотрения государств-членов, подписавших упомянутый протокол в контексте возможного появления «контролируемой» субсидиарности.

Ключевые слова: консультативное заключение; Европейский суд по правам человека; Конституционный совет Франции; Государственный совет Франции; Кассационный суд Франции; конституционный контроль; конвенционные обязательства; обязательная сила решений; диалог судей; отношения между правовыми порядками.

THE ADVISORY OPINION MECHANISM BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: PRELUDE TO ESTABLISHING A DELICATE BALANCE IN THE RELATIONSHIP BETWEEN FRENCH AND EUROPEAN JUDGES

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Protocol No. 16 to the European Convention on the Protection of Human Rights and Fundamental Freedoms – entered into force on 1 August 2018 after its ratification by France – extended Strasbourg Court's competence to give advisory opinions at the request of the highest courts or tribunal of contracting parties. This new mechanism aims to enhance the interaction between European judges and national authorities and reinforce implementation of the convention in accordance with the principle of subsidiarity. Nevertheless, the new procedure seems to have been conceived under a contradiction. Its

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analysis, as well as that of the first advisory opinion given at the request of the French Court of Cassation, raises a certain number of questions regarding the real respect of the margin of appreciation that remains to the member states in the context of a possible emergence of a «controlled» subsidiarity.

Keywords: advisory opinion; European Court of Human Rights; Conseil constitutionnel; Conseil d'État; Cour de cassation; constitutional control; conventional obligations; binding force; dialogue of judges; relationship between legal orders.

On 12 April 2018 France ratified Protocol No. 16 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter Protocol No. 16)[1]. It was the tenth country, after Albania, Armenia, Estonia, Finland, Georgia, Lithuania, San Marino, Slovenia and Ukraine, to express its consent to be bound by this Protocol[2]. The said ratification was considered as a symbol by French political authorities. During his official visit to the European Court of Human Rights in October 2017, the President Emmanuel Macron asserted that «…France has resolutely started the process of ratifying this Protocol, with the secret hope of being the tenth State to ratify it, the one that will allow it to enter into force»[3]. His wish was exhausted. Thanks to French ratification the Protocol No. 16 entered into force on 1 August 2018, almost five years after it was open for signature by the High Contracting Parties, on 2 October 2013. This optional protocol, producing effects solely with respect to those parties that will have proceeded to its ratification, extended the jurisdiction of the European Court of Human Rights to include advisory jurisdiction.

For the former President of Strasbourg Court Guido Raimondi the entry into force of the Protocol No. 16 marked «a fundamental stage in the history of the European Convention on Human Rights and a major development in the protection of human rights in Europe»[4]. According to its Art. 1, the Highest courts or tribunals of a High Contracting Party, as specified by the latter, can request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the convention or its additional protocols.

In France the Constitutional Council (Conseil constitutionnel), the Council of State (Conseil d'État) which is the highest court for administrative justice and the Court of Cassation (Cour de cassation) which is the highest court for judiciary justice are allowed to send to the European Court of Human Rights this kind of requests.

The integration of the Constitutional Council into the Protocol No. 16 mechanism was quite unexpected. Its relations with the European Court of Human Rights are marked by a particular specificity. In the famous decision of 15 January 1975 on the law relating to the voluntary termination of pregnancy (VTP)[5], the members of the Constitutional Council judged that they were not competent to control the compliance of laws with the international agreements and treaties regularly ratified by France, including the European Convention on Human Rights and its additional protocols.

This decision was based on two essential arguments from a legal and practical point of view. The argument of law inferred from a strict interpretation of Art. 61 of the Constitution: «Article 61 of the Constitution does not confer to the Constitutional Council a general power of appreciation and decision identical to that of Parliament, but only gives it competence to rule on the compliance with the Constitution of the laws referred to its examination». If the provisions of Art. 55 of the Constitution confer to the treaties a higher authority than that of the laws, «they neither prescribe nor imply that the respect of this principle must be ensured within the framework of the control of the compliance of laws with the Constitution provided for in its article 61».

As for the practical argument, according to the Constitution, the Constitutional Council has one month to render its decisions in the cases of *ex ante review,* the only type of constitutional control provided by French Constitutional Council until 2008. Consequently, this delay was considered insufficient for examining the conformity of laws with the very many international agreements and treaties ratified by France.

[1]Law authorizing the ratification of the Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms No. 2018-237. 3 Apr. 2018.

[2]Four other countries followed French ratification: Andorra (16 May 2019), Greece (5 April 2019), Netherlands (12 February 2019), Slovak Republic (17 December 2019). Height countries have only signed but not ratified it: Belgium (8 November 2018), Bosnia and Herzegovina (11 May 2018), Italy (2 October 2013), Luxembourg (6 September 2018), Norway (27 June 2014), Republic of Moldova (3 March 2017), Romania (14 October 2014), Turkey (20 December 2013). See the list of signatures and ratifications on: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=M9VtMTjQ.

[3]See Art. 8 of the Protocol No. 16 «This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7».

[4]Ratification du Protocole n° 16 à la Cour européenne de sauvegarde des droits de l'homme et des libertés fondamentales [Electronic resource]. URL: https://www.lextenso-etudiant.fr/actus-juridiques-culture-juridique/ratification-du-protocole-n°16-à-la-convention-européenne-de (date of access: 12.02.2020).

[5]Constitutional Council (hereinafter CC). Decision No. 74-54 DC of 15 Jan. 1975.

In the decision No. 86-216 DC of 3 September 1986, the Constitutional Council explicitly stated that the control of the superiority of treaties over laws must be carried out by the ordinary courts under the supervision of the Court of Cassation and the Council of State[6]. This jurisprudential position, considered as a French tradition[7], has never been changed, even after the introduction of the *ex post review* in 2008 by Art. 61-1 of the Constitution, called in France question prioritaire de constitutionnalité (QPC)[8]. The French Constitutional Council is still the only constitutional court in Europe, which does not expressly refer to the European Convention on Human Rights or the European Court of Human Rights' jurisprudence[9].

De facto, without this being explicitly declared, its constitutional rights and freedoms interpretation is issued in accordance with the European text and case-law mentioned above for two major reasons:

• the first one is not to be disavowed by the European Court of Human Rights;

• the second one is to ensure the unity and security of the French legal order.

The French doctrine has defined this type of influence as an intellectual one or a top-down influence[10] coming from the European Court of Human Rights, which is based on the principle of the persuasive authority of its case-law[11] and which allows the Constitutional Council to propose solutions in relation to a wider catalogue of rights and freedoms, much more recent than the Declaration of 1789. As it was pointed out by Olivier Dutheillet de Lamothe[12], former member of the Constitutional Council, four ways of influence can therefore be distinguished.

Firstly, the European Convention on Human Rights and the jurisprudence of the Court of Strasbourg have contributed to the emergence in France of new fundamental rights. It was the case of the right to respect for private life guaranteed by Art. 8 of the European Convention on Human Rights that constitutes, for the Constitutional Council, a component of personal freedom guaranteed by the general provisions of Art. 2 of the Declaration of 1789[13]. By using the same technique, the freedom of marriage, guaranteed by Art. 12 of the European Convention, was considered as a component of personal freedom protected by Art. 2 and 4 of the Declaration of 1789[14].

Secondly, the Strasbourg case-law has significantly enriched the French conception of certain rights. Freedom of expression, defined by the 1789 Declaration as «one of the most precious human rights», is no longer limited to the freedom to express one's opinions and the prohibition of censorship. It also implies access to pluralistic sources of information as it was clearly expressed by European Court of Human Rights in *Handyside* judgment of 7 December 1976[15]. This concept is now fully integrated into the case-law of the Constitutional Council, which expressly refers to the notion of pluralism of currents of thought and opinion[16].

Thirdly, the Strasbourg case-law had a major impact on the development of judicial procedures and in particular of criminal procedure. The Constitutional Council recognized, on the relatively tenuous basis of Art. 16 of the 1789 Declaration, a «right to an effective judicial remedy», which is directly inspired by article 6 of the Convention[17]. It was decided that the principle of respect for the rights of the defence, which results from article 16 of the 1789 Declaration, «implies, in particular in criminal matters, the existence of a fair and equitable procedure guaranteeing the balance of the rights of parties»[18]. This solution stems from the cases Delcourt v. Belgium[19] and Golder v. the United

[6]The Court of Cassation confirmed the judiciary judges competence to control the compliance of the French legal order with the international treaties in the decision Société des Cafés Jacques Vabre of 24 May 1975. The Council of State did the same for the administrative judges 14 years later in the decision Nicolo of 20 Oct. 1989.

[7]*Dutheillet de Lamothe O.* L'influence de la Cour européenne des droits de l'homme sur le Conseil constitutionnel [Electronic resource]. URL: https://www.conseil-constitutionnel.fr/les-membres/l-influence-de-la-cour-europeenne-des-droits-de-l-homme-sur-le-conseil-constitutionnel (date of access: 12.02.2020).

[8]See Art. 61-1: «If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period. An Institutional Act shall determine the conditions for the application of the present article».

[9]The Constitutional Council did it only once in the decision of 30 November 2004 on the draft treaty establishing an European Constitution. It expressly referred to the judgment of the European Court of Human Rights Leyla Sahin v. Turkey of 29 June 2004.

[10]*Gaïa P.* Le Conseil constitutionnel et la Cour européenne des droits de l'homme // Rev. trimest. des droits de l'homme. 2017. No. 109. P. 5–52.

[11]The word «case-law» is generally used to describe the collection of the legal principles derived from all the reported cases forming a body of jurisprudence on a specific field of law.

[12]*Dutheillet de Lamothe O.* L'influence de la Cour européenne des droits de l'homme sur le Conseil constitutionnel [Electronic resource]. URL: https://www.conseil-constitutionnel.fr/les-membres/l-influence-de-la-cour-europeenne-des-droits-de-l-homme-sur-le-conseil-constitutionnel (date of access: 12.02.2020).

[13]CC. Decision No. 99-416 DC of 23 July 1999.

[14]CC. Decision No. 2003-484 DC of 20 Nov. 2003.

[15]European Court of Human Right (hereinafter – ECtHR). Handyside v. United Kingdom. 7 Dec. 1976.

[16]CC. Decision No. 86-217 DC of 18 December 1986. Decision No. 89-271 DC of 11 Jan. 1990.

[17]CC. Decision No. 99-416 DC of 23 July 1999.

[18]CC. Decision No. 89-260 DC of 28 July 1989.

[19]ECtHR. Delcourt v. Belgium. 17 Jan. 1970.

Kigdom[20] relating to the right to a fair trial and to the equality of arms between parties.

Finally, the Strasbourg case-law has led the Constitutional Council to modify its case-law in the area of legislative validations. By decision No. 93-322 DC of 13 January 1994 the Constitutional Council admitted the conformity to the Constitution of Art. 85 of the law of 18 January 1994, which had validated the amount of an indemnity instituted in 1953 for the benefit of the staff of social security organizations in the department of Alsace-Moselle.

Nevertheless, after this decision, the European Court of Human Rights has developed its case-law admitting validations in a much more restrictive way[21], by operating a check of proportionality between the public interest invoked and the infringement of the individual rights of the person subject to litigation[22]. In the decision No. 99-422 DC of 21 December 1999, the Constitutional Council adapted its jurisprudence in the direction of that of the Court of Strasbourg and explicitly based on the principle of the separation of powers in order to exercise a proportionality check between the general interest and the infringement of the right to appeal of the litigant.

These examples provide concrete evidence of undeniable influence of the European Convention on Human Rights and the case-law of the Court of Strasbourg on the jurisprudence of the Constitutional Council. But the technique of top-down influence chosen by the French judges is a wise way to avoid possible direct confrontations with the Strasbourg judges and to keep a certain degree of freedom in choosing when and how the convergence of case-law solutions will be established.

This relationship could be completely disrupted in the context of the application of Protocol No. 16. The developments that may occur are likely to lead to a loss of freedom to which the Constitutional Council is so strongly attached. In order to avoid such eventualities, or at least to limit their number, the place of the Constitutional Council in the practical implementation of Protocol No. 16 should be discreet by safeguarding the jurisprudential solution adopted in the decision VRP from 1975.

This question does not arise in the same way for all the other French judges who exercise regular control of compliance of normative acts with the international treaties and agreements ratified by France. As a legal mechanism allowing jurisdictional communication, Protocol No. 16 is widely envisaged as institutionalizing the nebulous notion of judges' dialogue. On a theoretical level, its conditions of implementation appear favourable to such an establishing of relations between the European Court and the national High Courts. From the practical point of view, certain consequences seem to contradict this dialogical concept. In fact, can national judges be really free to request or not an opinion in the event of a difficulty in interpreting the rights and freedoms guaranteed by the Convention or its additional protocols, to determine the subject of the request and, the most important, to make the choice not to follow the European judges' advisory opinions?

If at present all consequences of the implementation of Protocol No. 16 are still uncertain, some operational elements, in particular the binding force of the European Court of Human Rights' case-law and its power to sentence member States in the event of failure in respecting their obligations in the field of fundamental rights, raise entirely justified questions regarding the possibility of maintaining a real balance in the relationship between national and European judges as well as the respect of national marge of appreciation and subsidiarity principles.

The procedural guarantees established by Protocol No. 16 face to the Court's case-law authority: a real problem of equilibrium

In consideration of the procedural guarantees established by Protocol No. 16, it would seem that national High courts have a relatively significant freedom for its application (I). This hypothesis must however be analysed in the light of the authority that the Court's advisory opinions are supposed to have in order to assess the real impact of the new procedure on the quality of the dialogue between national and European judges (II).

I. A procedure based on the states parties voluntary initiative. Under the provisions of Article 1 § 1 of Protocol No. 16, the Highest national courts and tribunals designated by the contracting states «may request the Court to give advisory opinions». The use of the verb «may» is essential. It implies that national judges are under no obligation to use this procedure in the event that they face a difficulty in interpreting the provisions of the Convention or its protocols. It is a faculty that is offered to the concerned jurisdictions. In this sense, the advisory opinions procedure under Protocol No. 16 differs from the preliminary ruling procedure established by article 267 of the Treaty on the Functioning of the European Union in order to secure legal unity by uniform interpretation and application of community law.

The general formulation of this competence also offers to the Highest national courts or tribunals the

[20]ECtHR. Golder v. the United Kigdom. 21 Feb. 1975.
[21]ECtHR. Greek Refineries Stran and Stratis Andreadis v. Greece. 9 Dec. 1994; Papageorgiou v. Greece. 22 Oct. 1997; National and Provincial Building Society v. United Kingdom. 23 Oct. 1997.
[22]ECtHR. Zielinski, Pradal, Gonzales and others v. France. 28 Oct. 1999.

possibility to define the subject and the scope of their request for an advisory opinion. Here we have a second difference between the Protocol No. 16 mechanism and the preliminary ruling procedure before the Court of Justice of the European Union where national judges don't have such a possibility of appreciation in case of a problem of interpretation of European Union law.

The initiation of the advisory mechanism resulting from Protocol No. 16 appears as being a procedure based on voluntary acts in order to open a real collaborative relationship between national and European judges. The freedom left to national Supreme judges to decide whether or not to request an advisory opinion from the Strasbourg Court is destined to «spare any national susceptibilities» in that it allows the specific features of national systems to be respected by not forcing them to be implemented a mechanism that could call into question the authority of their case-law.

In addition, the national highest courts or tribunals have the mission to appreciate the real opportunity to use this mechanism. In the respect of the provisions of Art. 1 § 3 of the Protocol No. 16, they must give reasons of their request and «provide the relevant legal and factual background of the pending case». This was the main argument invoked by the Council of State in the decision SARL Super Coiffeur of 12 October 2018 in order to refuse to request an advisory opinion to European Court of Strasbourg on the opposable nature of the reservation of interpretation formulated by French Republic concerning the stipulations of Art. 4 of Protocol No. 7, as claimed by the applicant. In the opinion of French supreme administrative judges, «as such reservations define the scope of the commitment that the State intended to subscribe to and as they are not detachable from the conduct of international relations, the administrative judge in not competent to assess their validity».

By taking advantage of the fairly significant degree of freedom in determining the subject of the request may be addressed to the Court of Strasbourg for an advisory opinion, the Supreme national judges could use this procedure in order to put an end to the divergences existing at national level on complex societal questions or in the cases where political authorities don't provide necessary legal solutions. It was exactly the way chosen by French Court of Cassation.

On 12 October 2018, the Supreme judiciary judges requested the Court of Strasbourg to give an advisory opinion for the following questions.

1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the intended mother as the legal mother, while accepting registration in so far as the certificate designates the intended father, who is the child's biological father, is a state party overstepping its margin of appreciation under Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms Convention? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the intended mother?

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Art. 8 of the Convention?

This request of an advisory opinion emanated from the facts of Strasbourg Court's judgment Mennesson v. *France*[23]. In this case, two children born in the United States via a surrogacy arrangement were denied legal recognition, in France, of their relationship with their intended parents, even though that relationship was legally recognized in the United States. The European Court decided that there had been no violation of any party's right to respect of their family life, but that the children's right to respect for private life had been violated.

Since this ruling, French courts have allowed the registration of the intended father as the legal father, if he was also the biological father of the children in question, but did not provide the same recognition to the intended mother. The only option under French law is for an intended mother to adopt her spouse's child, provided she is married to the biological and intended father. In 2017, the Mennessons, acting as their children's legal representatives, requested a new decision regarding their appeal against the Paris Court of Appeals' 2010 decision to annul the legal recognition of both parents' relationship with their two children. The French Court of Cassation requested an advisory opinion from the European Court for the purposes of re-examining that appeal.

In its first advisory opinion of 10 April 2019, the European Court of Human Rights considered the parental rights, under French law, of intended mothers to children born abroad through a surrogacy arrangement[24]. It established that intended mothers, whether biological or not, should have the possibility of obtaining legal recognition in France of their relationship with the child where the intended (and biological) father has been legally recognized and where the intended mother is identified as the legal mother in the foreign birth certificate.

[23]ECtHR. Mennesson v. France. 26 June 2014.
[24]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. 10 Apr. 2019. Request No. P16-2018-001.

Following the European judges' opinion, the Court of Cassation allowed, in the judgment of 4 October 2019, the registration for both parents. It should nevertheless be noted that this registration was here pronounced exceptionally and *in concreto* but this is undoubtedly a big step forward in the legal apprehension of gestational surrogacy arrangements in France. In its advisory opinion, the European Court of Human Rights stated that an absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests. The states are free to choose the method of establishing legal recognition of the relationship of the children born *via* a surrogacy arrangement with their intended parents, as long as all the children enjoy the same rights.

Undoubtedly, the French Parliament will have to find a solution in the context of an increase of the number of surrogacy arrangements. Especially since it seems quite difficult to envisage a possible opposition of national judges to the very clear solution issued by the Court of Strasbourg. This is where the question of the limit of the national judges' freedom within the framework of the new procedure established by Protocol No. 16 arises, in particular with regard to the position they can adopt concerning the authority of European Court's advisory opinions.

II. The impossible dialogue of judges due to the real authority of advisory opinions. Art. 5 of the Protocol No. 16 states that «advisory opinions shall not be binding». The wording of this article is clearly in opposition to that of Art. 46 of the Convention, according to which final judgements of the Court are binding. However, this does not mean that they are devoid of any legal consequence and that national judges can really ignore them. The functioning of the European Court of Human Rights is in principle based on the right of individual application under Art. 34 of the Convention and on the binding force of its judgments. These two parameters oblige member states «to comply with its jurisprudence» in order to avoid being subsequently sentenced for violation of the rights and freedoms guaranteed by the Convention. If the procedure of advisory opinions is presented as a consultative one, it still articulates with the right of individual petition. In 2013, the Court stated in its opinion on the draft Protocol No. 16 that in case that a party is not satisfied with the given opinion, he or she will have the possibility to submit an individual application according to the procedure provided for in Art. 34 of the Convention.

Consequently, in theory, it is possible for a High court not to follow an opinion which itself requested, notwithstanding the highly illogical nature of such a position. Nevertheless, the articulation between the advisory jurisdiction and the contentious jurisdiction of the Strasbourg Court would certainly have the effect of dissuading such behaviour. If a High national court requests an advisory opinion under Protocol No. 16 may be condemned by the Strasbourg Court, it is *de facto* subordinate to it. Their relationships within this framework are conditioned by an obligation to take into account the solutions delivered by European judges and not of a voluntary opening to the case-law. This is why L. A. Sicilianos says that in the long term, the advisory opinions will have an *erga omnes* effect[25].

Moreover, Art. 2 of the Protocol No. 16 provides that an advisory opinion on a request submitted by a designated court or tribunal will be delivered by the Grand Chamber of the Court as constituted under Rule 24 § 2 (h) of the Rules of Court[26]. This can be explained by the nature of the questions it is supposed to examine, which must concern the most relevant cases of interpretation and application of the Convention provisions. Consequently, the importance of the questions to be answered by the Grand Chamber confers particular authority on its advisory opinions. It such a situation, it is quite difficult to imagine the cases when national judges could openly oppose the solution proposed by the court. Especially since the court wishes to supervise the follow-up given to its advisory opinions.

On 18 September 2017, Plenary Court approved the Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the European Convention on Human Rights. The said document is intended to offer practical assistance on the initiation and follow-up to the procedure set out in Protocol No. 16 to the courts or tribunals with competence to submit a request for an advisory opinion. In Chapter XII entitled «Follow-up to the Court's opinion», European judges underlined that «the requesting court or tribunal is invited to inform the Court of the follow-up given to the advisory opinion in the domestic proceedings and to provide it with a copy of the final judgment or decision adopted in the case». So, it clearly appears that in fact the Court established the binding force of its advisory opinions and a kind of supervision of their execution placed under its responsibility.

As such, it seems difficult to envisage that the national judges having seized the Court of a request with the objective of obtaining an advisory opinion because

[25] *Sicilianos L. A.* L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole n°16 à la Convention européenne des droits de l'homme // Rev. trimest. des droits de l'homme. 2014. No. 97. P. 9–30.

[26] A request for an advisory opinion will first be examined by a five-judge panel of the Grand Chamber. The panel's examination will be focused essentially on whether the request submitted to the Court concerns a question or questions of principle which relate to the rights and freedoms defined in the Convention and the Protocols there to and whether it meets the procedural requirements established in Art. 1 § 3 of the Protocol No. 16 and outlined in Rule 92 § 2.1 of Chapter X of the Rules of Court regarding its form and content. It will decide on whether or not the request is to be accepted for examination by the Grand Chamber.

of concrete difficulties of interpretation or application of the Convention or its additional Protocols provisions, have «the possibility of opting for different solutions». If the case happens, the question is how could they convince the European Court that another interpretation is possible?

In the above mentioned Guidelines, the Court says that «the requesting court or tribunal is left with a degree of discretion in determining whether it is "relevant" to include a summary of the arguments of the parties on the question which is the subject matter of the request and whether or not it is "appropriate" to set out its own views on the question. <…> What is important is that the requesting court or tribunal, in the exercise of its judgment, places the Court in the most informed position possible in order to enable it to provide the interpretative guidance sought by the requesting court or tribunal as regards the application of Convention law to the domestic proceedings»[27]. Then, the «registry of the Court may, at the request of the President, contact the requesting court or tribunal with a view to seeking further particulars on the request and accompanying documentation»[28].

In sum, the national highest courts or tribunals may expose their own views on the question raised by the request during the first procedural steps. If the European judges speak about promotion of constructive dialogue between the Court and the national courts and tribunals in order to further their interaction, their concept of dialogue is certainly not identical to that of national judges who interpret it as an exchange of views at all stages of the procedure.

In the opinion of Professor Joël Andriantsimbazovina, the authentic interpretation of a norm constituting a legal order benefits from the interpretative authority because it is rendered by the jurisdictional body which has been designated to determine its meaning[29]. Consequently, this interpretation will have to be taken up by all authorities responsible for the application of this standard, especially national judges in the case of the European Convention on Human Rights. The advisory opinions established by Protocol No. 16 fall precisely within this logic, insofar as the aim of this procedure is to allow better harmonization of the implementation of the Convention at the domestic level by giving the highest national courts or tribunals the means to apply its provisions while respecting «the privileged interpretation»[30] formulated by the Grand Chamber.

As it can be seen, the concepts of dialogue and interpretive authority are not synonymous. The latter is in fact a means of extending the obligation and the constraint of international law on the office of the domestic judge while the dialogue of judges remains a banal factual observation of the taking into account of standards produced in another legal order. In such a situation, the chances of a possible establishment of a dialogue between French highest courts and the European Court of Human Rights diminish considerably.

This finding is fully confirmed by the conclusions we can read in the Final report on measures requiring amendment of the European Convention on Human Rights where the Committee for Human Rights lists the arguments in favour of opinions being binding: «Included that the Court is the central authority for ensuring uniform application of the Convention. Should the request come from a court and the opinion be merely optional, this would lead to loss of the potential gain expected from the procedure, since the applicant would probably subsequently apply to the Court, which would have acknowledged his rights in the context of the advisory opinion procedure: a binding advisory opinion would offer finality. The extent to which the advisory opinion would be binding could depend on the nature of the case: if in relation to a specific systemic/structural problem, then the advisory opinion would be binding for the requesting authority; if on interpretation of the Convention, then a general binding effect for all States Parties. It is difficult to envisage a non-binding advisory opinion when it is optional to make the request: this would imply that the domestic authority could apply a solution contrary to that indicated by the Court, following which the individual would almost certainly make an application to Strasbourg; this would run contrary to the purpose of the system»[31].

In this regard, as Giovanni Zampetti highlighted in his study[32], the new procedure seems to have been conceived under a contradiction. Despite the formal characteristics, the practical use of the advisory opinions, while also taking part in the Court's case-law, could all the same strengthen a changing in the role of the Court connected with the progressive definition of a uniform standard of interpretation of the Convention. In this new architecture, the concepts of national margin of appreciation and subsidiarity, as well as their application, will have to be reinterpreted.

[27]Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the European Convention on Human Rights [Electronic resource]. URL: https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf (date of access: 12.02.2020).

[28]Ibid.

[29]*Andriantsimbazovina J.* Le dialogue des juges: mélanges en l'honneur du Président Bruno Genevois. Paris: Dalloz; 2009. P. 11.

[30]Ibid.

[31]Final report on measures requiring amendment of the European Convention on Human Rights [Electronic resource]. URL: https://rm.coe.int/168045fdc5 (date of access: 12.02.2020).

[32]*Zampetti G.* The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection [Electronic resource]. URL: https://www.econstor.eu/bitstream/10419/185058/1/1040654460.pdf (date of access: 12.02.2020).

The respect of national margin of appreciation and subsidiarity principles: a necessary reassessment of the objectives?

In his speech of 31 October 2017 before the European Court of Human Rights, the President Emmanuel Macron affirmed that in relations between the court and national authorities «recognition of the national margin of appreciation» is «the key to success dialogue». This means that France, like all the other state parties, did not really agree to give Strasbourg a *carte-blanche* on how to interpret the European Convention on Human Rights. The interpretation of the rights and freedoms resulting from the Convention in accordance with the principles of subsidiarity (II) and national margin of appreciation (I) is essential for maintaining respectful relationships between all the parties. It is therefore necessary to consider the potential consequences of Protocol No. 16 on the evolution of these relations.

I. The potential weakening of the margin of appreciation. In the first advisory opinion of 10 April 2019 the European Court of Human Rights stated that with respect to the state's margin of appreciation, an important factor – determined on a case-by-case basis – is the existence of legal common ground between states in Europe. In general, the low level of consensus on the issue of a concrete case suggests a greater margin of appreciation. However, from the point of view of European judges, the margin of appreciation may be restricted in cases in which particularly important issues of identity, such as the legal recognition of a parent-child relationship, are at stake. Thus, they concluded that the State's margin of appreciation is reduced given the circumstances outlined in this case and, considering the best interests of the child, Art. 8 requires that French domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the legal mother.

The opinion also states that the best interests of the child dictate that the period of legal uncertainty surrounding children's relationship with their parents should be as brief as possible. Based on the lack of legal consensus within Europe, the Court concluded that it falls within states' margin of appreciation to decide how exactly to recognize the parent-child relationship. Therefore, alternatives including adoption by the intended mother may satisfy Art. 8 so long as the process can be completed promptly and effectively and in accordance with the best interests of the child.

By this advisory opinion, the European judges indicated the procedure to follow for a more effective guarantee of the rights' protection. In the same time, the margin of appreciation of French judges was considerably reduced, for not to say it doesn't exist at all. In the opinion of European judges, no other interpretation is possible in such a case. The margin of appreciation can be accepted only in the manner the parent-child relationship must be recognized and this competence generally comes under the powers of Parliament.

The doctrine of margin of appreciation developed by the European Court of Human Rights allows it to take into account the fact that, given the divergent legal and cultural traditions of member States, the Convention may be interpreted differently. As the Strasbourg judges noted in the famous case Handyside v. United Kingdom, where they used for the first time this concept, «by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them…»[33]

The Court clarified its position in the case Schalk & Kopf v. Austria saying that «the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background»[34]. Progressively, the European judges distinguished the categories of cases when member states' margin of appreciation is narrow or wide. If a particularly important facet of an individual's identity or existence is at stake[35], as well as an intimate aspect of private life, especially if it concerns the best interests of the child, the national margin of appreciation is considered as narrow, in the same way as the protection of the authority of the judiciary[36] and racial or ethnic discrimination[37].

Viewed from this angle, the solution adopted by the Court in the first advisory opinion requested by French Court of Cassation is perfectly consistent with its case-law. Nevertheless, the question does not arise in the same way for the cases for which member states enjoy a wide margin of appreciation, as for example cases involving the protection of morals[38], legislative implementation of social and economic policies[39]. It is particular in these areas that is still maintained a larger space for dialogue between the national judges and the European human rights judges insofar as it makes it possible to attenuate the constraint that the Court can exercise on national courts.

[33]ECtHR. Handyside v. United Kingdom. 7 Dec. 1976.
[34]ECtHR. Schalk & Kopf v. Austria. 24 June 2010.
[35]ECtHR. Evans v. United Kingdom. 10 Apr. 2007.
[36]ECtHR. Sunday Times v. United Kingdom. 26 Apr. 1979.
[37]ECtHR. D.H. v. the Czech Republic. 13 Nov. 2007.
[38]ECtHR. Handyside v. United Kingdom. 7 Dec. 1976.
[39]ECtHR. Hatton v. United Kingdom. 8 July 2003.

The margin of appreciation is absolutely necessary for balancing the sovereignty of member states with their obligations under the Convention but Protocol No. 16 could have a negative effect on the maintain of this balance since national judges may indirectly be forced to adopt the chosen solution by the Grand Chamber in its advisory opinions in order to avoid further contentious cases. Such an approach to Protocol No. 16 certainly limits the risks of conflict between national and conventional protection of fundamental rights but harmonization would no longer be constructed between judges but imposed by Strasbourg. Consequently, national judges responsible for the application of the Convention may have limited possibilities to build a protection system taking into account the specificities of each legal order.

There is now a corpus of accumulated Strasbourg Court jurisprudence, a veritable legal system unto itself. This system is being continuously transposed into domestic legislation and jurisprudence in the member states of the Council of Europe. The signatories of the Convention, of course, have different ways of assimilating these minimum human-rights standards into their own legal systems. But this must be done in a progressive and constructive approach with taking into account national particularities. It cannot be imposed by Strasbourg without disregarding the principle of the margin of appreciation, as well as that of subsidiarity.

II. The possible emergence of a controlled subsidiarity. As defined by Herbert Petzold, «The principle of subsidiarity implies that in a community it falls, in the first place, on the smaller and lower social units to assume the responsibility for functions of the society. The larger and higher social units should only take over insofar as the smaller units are unable to do so»[40]. In the European Convention on Human Rights, there is no express reference to the principle of subsidiarity. Its basis can be found in Art. 1 of the Convention, which provides that The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.

Consequently, within the Convention system, the principle of subsidiarity means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the contracting states rather than with the European Court of Human Rights. The last can and should then intervene only where the domestic authorities fail in that task[41], as it was stated in Belgian Linguistic case where Strasbourg judges firstly referred to the principle of subsidiarity: «…the Court cannot disregard those legal and factual features which characterise the life of the society in the state which, as a contracting party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention».

Protocol No. 16 announces from its preamble that «the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity». Advisory opinion is clearly «a child of its time». The present so-called age of subsidiarity is typically considered to be characterized by a stronger reliance on the margin of appreciation doctrine and an increased use of advisory opinions by the Strasbourg Court. Nevertheless, the principle of subsidiarity suppose that member states, and especially national judges, decide first on the conditions of application and interpretation of the law stemming from the Convention. There must be an autonomous use of the Convention by the national judge and correlatively to this respect for the autonomy of the legal orders of the member states by the European Court. Without respect for this autonomy, the spirit of dialogue and cooperation highlighted by the Court in its *Guidelines*[42] cannot be really envisaged.

Protocol No. 16 sets up a prior mechanism aimed to prevent further violations of the Convention. The advisory opinions given by the court would have the function of guiding or even directing the interpretation of the national judges of the rights and freedoms guaranteed by the Convention. But in concrete terms, where is the subsidiarity if the European Court anticipates and resolves in advance the problems of interpretation that the national judge may encounter through advisory opinions? Where is the subsidiarity if the national judge confines himself to applying and respecting, certainly within the framework of a proceeding of internal law, the advisory opinions used by the Court to harmonize the interpretation of rights and freedoms?

These questions have been asked by many representatives of the doctrine. For example, G. Lübbe-Wolff noted that: «to advertise it [Protocol No. 16] as reinforcing the principle of subsidiarity seems to me to turn the matter upside down. I would rather see it as opposed to the idea of subsidiarity in its procedural as well in its substantive sense»[43]. In fact, if the application of Protocol No. 16 is sufficiently developed by the national highest courts or tribunal, the Stras-

[40] *Petzold H.* The Convention and the Principle of Subsidiarity // The European System for the Protection of Human Rights / Macdonald R. St. J., Matscher F., Petzold H. (eds). Dordrecht : Martinus Nijhoff Publishers, 1993. P. 41–62.
[41] Ibid.
[42] Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the European Convention on Human Rights, op. cit. P. 2.
[43] *Lübbe-Wolff G.* How can the European Court of Human Rights reinforce the role of national courts in the convention system? // Human Rights Law Journ. 2012. No. 32. P. 13–14.

bourg judges could become a kind of «European super legislators» and thus reduce the preponderance of the European consensus which is a source of divergences leading to difficulties of interpretation, even national blockages in some cases. Such a position will probably allow the Court to drastically reduce its workload, but the principle of subsidiarity is distorted because national judges have not the same freedom to decide, first and in a discretionary manner, solutions specifically adapted to the peculiarities of internal law or social context. It is a means of establishing a kind of controlled subsidiarity which will irredeemably lead to a strengthening of the court's authority. Consequently, it must be admitted that the relationship between the Court and the national judges can not be based on the dialogue, which presupposes an exchange between interlocutors on an equal basis, but not on a relationship of authority.

In the opinion of G. Lübbe-Wolff, the mechanism of the advisory opinions would certainly allow national judges to «make the imperative of human rights a matter of import rather than a matter of domestic production and genuine domestic belief»[44]. In the same time, it is not absolutely sure that the instrument would be conducive to better integration into and assimilation of the Convention system. Moreover, a problematic relationship between constitutional judges with the European Court of Human Rights might be expected, in spite the optional nature of the request and its non-binding effects. For instance, when in practice a request would imply, more or less explicitly, a matter of compatibility of a national law with the Convention, the constitutional judges could choose to follow the opinion, thereby confirming a pure loss in terms of interpretative powers regarding the assessment of compliance of national legislation with the Convention. In the same way, they could disregard the opinion, thus further enhancing the – still prevailing – internal level of protection, creating a situation of tension with the Strasbourg Court. This balance can be weakened not only in terms of the relations between constitutional judges and European judges, but also between constitutional judges and ordinary judges, in the case where the former decide to prevail the level protection guaranteed by the constitution. The proliferation of different judicial mechanisms may determine a decrease in the effectiveness of the protection of the rights, especially by extension of the delays of judicial proceedings.

Only the real working of the procedure could answer with certainty the doubts expressed in different scientific studies, as well as in the Final Report of the Committee for Human Rights[45], but the ambiguities shaping the innovation already seem identifiable. In his speech pronounced for the opening of the judicial year of the European Court of Human Rights on 31 January 2020, Professor Rick Lawson said: «The Convention's environment does not just offer opportunities for the Court to happily move on and enhance its standards. It also presents challenges. Indeed, today we experience a genuine "climate change" that cannot be ignored. Pluralism, tolerance and broadmindedness – to use the famous expression from Handyside – are in decline. The Secretary-General, the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission: they have all stated, and deplored, time and again, that the rule of law is under pressure. So we face new "present-day conditions", that may have a direct impact on the very foundations of the Council of Europe: human rights, democracy and the rule of law»[46]. It is absolutely sure that the Court must act when the independence of the judiciary, the position of civil society, human rights defenders, academic freedom are threatened. But the best and most effective solution is the Court do it while respecting the founding principles of the Convention and its jurisdiction: the principles of national margin of appreciation and subsidiarity.

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[44] *Lübbe-Wolff G.* How can the European Court of Human Rights reinforce the role of national courts in the convention system? // Human Rights Law Journ. 2012. No. 32. P. 13–14.

[45] For a summary of the critical and negative aspects potentially related to the new procedure see the Final Report cited above, in particular § 58–59: «The following general arguments have been advanced against the proposal to extend the Court's jurisdiction to give advisory opinions: a. The purpose of the proposal is unclear and may not be suitable to the current state of the Convention system, which is in several ways distinct from other judicial systems that allow for the possibility of requesting advisory opinions; b. It could increase, rather than decrease, the Court's case-load by creating a new group of cases that would otherwise not be presented; c. The Court is already over-loaded and could have difficulty in absorbing this new competence satisfactorily; d. The Court is already able to deal with many cases revealing potential systemic or structural problems and regularly does so; e. Implementing the proposal could also lead to additional work for national courts. f. It would introduce a delay into national proceedings whilst the national court awaited the Court's advisory opinion. This would be inevitable and would be taken into account by the national court when considering whether to make a request; g. The authority of the Court could be put in question if the national court did not follow the advisory opinion, if non-binding. h. Implementation of a new system may create a risk of conflict of competence between national constitutional courts and the European Court of Human Rights, depending on the characteristics of the model chosen».

[46] *Lawson R.* A Living Instrument: The Evolutive Doctrine, 31 January 2020 [Electronic resource]. URL: https://www.echr.coe.int/Documents/Speech_20200131_Lawson_JY_ENG.pdf (date of access: 12.02.2020).