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ADVISORY OPINIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: IMPACT ON THE HUMAN RIGHTS PROTECTION IN THE EU

Master Thesis

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ABBREVIATIONS

CC – Constitutional Court

CJEU, ECJ – Court of Justice of the European Union

DAA – Draft Accession Agreement of the European Union to the European Convention on Human Rights and Fundamental Freedoms

HOC – High Ordinary Court

ECHR, Convention – European Convention on Human Rights and Fundamental Freedoms

ECtHR, Court, the Strasbourg – European Court of Human Rights

EU, Union – European Union

HCP – High Contracting Party to the European Convention on Human Rights

MS – Member State of the European Union

Opinion, Opinion 2/13 – Opinion of the Court of Justice of the European Union (Full Court) of 18 December 2014

Protocol, Protocol No. 16 – Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

INTRODUCTION

Relevance of the final thesis. Article 2 of the Treaty on European Union (hereinafter the TEU) declares respect for human rights as one of the values of the European Union (hereinafter the EU, the Union). For this to be a reality, fundamental rights should be protected on the national level of each Member State of the Union (hereinafter the MS) by their constitutions and on the EU level by the Charter on Fundamental Rights of the European Union (hereinafter Charter). Moreover, one of the most fundamental instruments on the human rights protection in Europe, the European Convention on Human Rights (hereinafter the ECHR, the Convention), gives the Union an opportunity to accede to it[1] and Article 6(2) of the TEU requires the Union to do this[2]. The EU has not acceded to the Convention yet, however, all the MSs as the independent members of the Council of Europe have ratified it.

In order to ensure higher level of human rights protection standards, the Convention is being improved periodically by the adoption of the protocols additional to it. One of the last protocols adopted was the Protocol No. 16, which provides for the advisory opinion procedure according to which "[highest courts and tribunals of a High Contracting Party (hereinafter HCP) will be allowed to request the European Court of Human Rights (hereinafter the Court, the ECtHR)] to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto"[3]. There are, however, certain doubts about whether the goals of the Protocol can be achieved by the means provided in it. For example, this procedure will be not obligatory and the advisory opinions issued will be not legally binding neither for a requesting national court, nor for any other HCPs, nor for the Court itself. Consequently, there is a question whether the HCPs will apply the procedure and follow the advisory opinions and, thus, whether the Protocol will be an effective tool for enhancing the human rights protection. Moreover, the Court of Justice of the European Union (hereinafter the CJEU, the ECJ) delivered its Opinion 2/13, in which it concluded that the advisory opinion procedure could undermine the autonomy of the preliminary reference procedure prescribed by Article 267 of the Treaty on the Functioning of the European Union[4] (hereinafter

[1] Article 59(2) ECHR provides: "The European Union may accede to this Convention."
[2] Article 6(2) TEU provides: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."
[3] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 1(1), https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.
[4] Article 267 TFEU provides: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; …"

TFEU) and EU law as a whole.[5] In the last years, however, the CJEU has established itself as a court interested in its own autonomy, rather than in the human rights protection.[6] Having in mind that its opinions have an influence on the decisions of the EU Member States and the importance of the Convention for the human rights protection, there is a significant need to establish whether indeed the Protocol will have such an effect on EU law and if yes, whether the Protocol will, thus, become an inappropriate tool for the human rights protection in the Member States of the Union.

Neither the Union, nor its MSs are obliged to accede to the said Protocol. Nevertheless, more and more MSs decide to accede to the Protocol. For instance, 7 out 12 High Contracting Parties (hereinafter the HCPs) that have ratified the Protocol are the Member States of the EU; 2 of them, the Netherlands and Greece, have ratified the Protocol just recently, in 2019. Even more, on October 16, 2018, the French Court of Cassation made the first and, as for now, the only request for an advisory opinion.

A misconception about the advisory opinion procedure and its possible consequences may have a negative impact on the protection of human rights in the EU. Considering the importance of the human rights protection for each democratic state and that it is listed among the values of the EU, an in-depth analysis of the Protocol is essential. During this analysis there is a need to determine whether further accession to the Protocol is needed and what will be the consequences of the MSs' accession to the Protocol. This should be done as early as possible, namely, when there are only 7 MSs have ratified the Protocol and before the EU as a whole has acceded to it.

Problem of research. In order to ensure the protection of human rights and to avoid possible negative impacts of the Protocol on that protection in the EU, further questions should be answered:

1) In which way the advisory opinion procedure could influence the protection of human rights in general?

2) Whether the advisory opinion procedure could become an effective tool for enhancing the human rights protection on the territory of the EU/ EU's Member States?

Scientific novelty and overview of the research on the selected topic. Since the Protocol has entered into force in August 2018, the first and the only advisory opinion was issued on April 10, 2019. Consequently, the case law, on the basis of which an impact of the Protocol on the

[5] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 198-200, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.
[6] Aidan O'Neill, "Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty." Eutopia Law, 18 December 2014. https://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/

human rights protection could be assessed, has not been developed yet. It is possible only to assume what that impact will be in the future. There is also not much of scientific work is done on this issue. There is a small number of the papers devoted to the analysis of the main provisions of the Protocol (such as Gragl[7], Paprocka & Ziółkowski[8]). Some works are dedicated to the comparative analysis of the advisory opinion procedures under ECtHR and IACHR.[9] Far less amount of literature concerns the practical issues of the application of the advisory opinion procedure. For instance, Open Society Foundation did a research on the implementation of the Protocol[10]. Analysis of the possible impacts of the Protocol application in the EU relates mainly to a comparison of the preliminary reference and the advisory opinion procedures.[11] There are also some works, which examines the Opinion 2/13 of the CJEU.[12] However, its paragraphs about the Protocol No. 16 are touched upon only slightly in those works.

There are also some explanatory documents with regard to the Protocol, for instance the Explanatory Report prepared by the Council of Europe[13] and the Opinion of the Court on Draft Protocol No. 16[14]. However, both of them refer to the initial stage of the adoption of the Protocol as they were issued before the final text of the Protocol was adopted. Consequently, they can be referenced only in order to clarify some details, but not as the main sources.

Significance of research. Analysis of the preconditions and the history of adoption of the Protocol, its aims and the main provisions, comparative analysis of the advisory opinion and the preliminary reference procedures, analysis of the Opinion 2/13 paragraphs about the Protocol No. 16, and analysis of EU law will help to determine first, whether the Protocol No. 16 is an appropriate instrument for ensuring the better protection of human rights; second, whether the advisory opinion procedure will contradict with EU law, in particular Article 267 TFEU, and

[7] Paul Gragl, "(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions Under Draft Protocol No. 16." (2013) *European Law Review* 38, no. 2 (2013): 229-247.
[8] Ada Paprocka and Michał Ziółkowski, "Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights." *European Constitutional Law Review* 11, no. 2 (2015): 274–92. https://doi.org/10.1017/S1574019615000176.
[9] See, for example, "LEGAL BRIEFING: Implementing ECHR Protocol 16 on Advisory Opinions." Open Society Justice Initiative, March 2016. https://www.opensocietyfoundations.org/sites/default/files/briefing-echr-protocol-16-20160322.pdf
[10] See, for example, *Ibid.*
[11] See, for example, Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014): 630–51. https://doi.org/10.1177/1023263X1402100404.
[12] See, for example, Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", Verfassungsblog on mattares constitutional (blog). December 12, 2014. https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/; Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13." German Law Journal 16, no. 01 (2015): 147-67.
http://www.mpil.de/files/pdf4/Krenn_A_Path_to_ECHR_Accession_After_the_ECJs_Opinion.pdf.
[13] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series* No. 214 (2013). https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.
[14] European Court of Human Rights. "Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention." 6 May 2013. https://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.

undermine its autonomy; third, whether the protection of human rights in the EU's MSs will be better achieved with the help of the advisory opinion procedure.

The aim of research. The aim of the Master Thesis is to comprehensively examine the provisions of the Protocol in order to assess the potential of the mechanism established by the Protocol to enhance the protection of human rights in the EU, as well as to identify potential obstacles of its application and propose the solutions to the identified problems.

The objectives of research. To achieve the established aim the research has the following objectives:

1. To analyse the main reasons and prerequisites for the adoption of the Protocol.

2. To determine the aims of the Protocol No. 16, to analyse its main provisions and to find out whether the aims could be achieved by the means provided in the Protocol.

3. To determine how the advisory opinions will influence the HCPs upon whose requests those opinions were issued as well as other HCPs, including those who will not ratify the Protocol no. 16.

4. To determine how the advisory opinion procedure will influence the relationship between the Constitutional Courts and the Highest Ordinary Courts.

5. To analyse the preliminary reference procedure under the CJEU, which became the basis for the advisory opinion procedure, and to determine the main similarities and differences of these two procedures and to assess whether the advisory opinion procedure could have the similar success as the preliminary reference procedure does.

6. To analyse the Opinion 2/13 issued by the CJEU and to establish whether the advisory opinion procedure will undermine the autonomy of the CJEU and EU law and whether this autonomy could be put higher than the human rights protection.

Research methodology. The following methods were used in order to achieve the aim of the Master Thesis:

1.Linguistic method. This method was used in order to understand the meaning of the advisory opinion procedure, the preliminary reference procedure, etc., as well as for the interpretation of the meaning of the legal norms for writing the Master Thesis.

2. Comparative method. This method was used for the comparison of the opinions of different researchers on the same issues. Most extensively, however, this method was used to compare the advisory opinion and the preliminary reference procedures.

3. Systematic analysis method. Systematic analysis method was used to clarify the meaning of the advisory opinion procedure and to find out in which way existence of such a

procedure could influence the protection of human rights in the Union. It also was used to assess and systematize the different sources of information in order to identify the most relevant issues.

4. Method of logics. This method was used in conjunction with the other methods to determine whether the raised assumptions could be confirmed or denied.

Structure of research. At the beginning of Chapter I, I will determine what were the preconditions for the adoption of the Protocol No. 16 and will describe the history of its adoption. I will pay special attention to the Report of the Group of Wise Persons, in which the proposal to extend ECtHR's advisory jurisdiction was expressed for the first time, and to the Brighton Declaration, which became the last push for the adoption of the Protocol. Further, I am going to establish the aims of the Protocol and will conduct the analysis of its main provisions.

In Chapter II of the Thesis, I am going to focus on the analysis of the application of the Protocol in the context of the EU legal order. First of all, I will determine which value the advisory opinions will have for the national courts and how this procedure could influence the Constitutional Courts and their relationship with the Highest Ordinary Courts. Second, I will analyse the preliminary reference procedure that became the basis for the Protocol. Namely, I will establish what are the main differences and similarities of these two procedures and will determine whether the Protocol No. 16 has those characteristics that enabled the preliminary reference procedure to achieve the goals set for it. Moreover, I will conduct an in-depth analysis of the provisions of the Protocol in order to understand whether the aim of the Protocol No. 16 could be achieved by the means provided in it. Finally, I will analyse the Opinion 2/13 of the Court of Justice of the European Union. Namely, I will establish whether the advisory opinion procedure will indeed undermine the autonomy of EU law and whether this autonomy could be put higher than the human rights protection. At the end of the analysis I should come to a conclusion whether the Protocol No. 16 to the ECHR could become an effective tool for the enhancement of the human rights protection in the European Union.

Defence statements. The Protocol has a potential to enhance the judicial dialogue between the national courts and the ECtHR, however would not necessarily enhance the protection of human rights in the EU, unless further amendments to the provisions of the Protocol, specifying admissibility criteria and establishing the follow-up control, would be introduced and the relationship between the mechanism under the Protocol and the preliminary reference procedure would be defined.

1. HISTORY OF ADOPTION. ANALYSIS OF THE PROVISIONS OF PROTOCOL

According to Article 32 of the Vienna Convention on the Law of Treaties, one of the means of the treaty interpretation is recourse to the preparatory work of the treaty and the circumstances of its conclusion.[15] This way of the interpretation is a supplementary one. In my opinion, however, for a better understanding of a document it is essential to understand what were the grounds for its adoption and which problems its creators wanted to solve with the help of that document. This is why I would like to begin Chapter I with identifying the preconditions for the adoption of the Protocol and clarifying the history of its adoption. For a better understanding of the essence of the Protocol, I will establish and clarify the aims of the Protocol. Of course, no analysis of an instrument is possible without characterization of its main provisions. So, further I will move to the analysis of the main provisions of the Protocol No. 16. At the end of the Chapter, I hope to get a better understanding of the essence of the Protocol in order to be able to analyse the odds of the Protocol to become an effective tool for the human rights protection in the European Union in Chapter II.

1.1. Preconditions for the Adoption of Protocol

In 2006 the Group of Wise Persons in its Report to the Committee of Ministers, set up under the Action Plan adopted at the Third Summit of the Heads of State and Government of the Member States of the Council of Europe in Warsaw on 16-17 May 2005, pointed out the significant increase in the number of the individual applications filed to the Court and emphasised that this could threaten the protection of human rights in the Court.[16] As it was stated by the Explanatory Report to Protocol No. 11[17], the need for the reforms of the Convention system was 'increasingly urgent'. So, the Report of the Wise Persons became the beginning of those reforms, the aim of which was to make the ECtHR's work more effective, while at the same time enhancing its legitimacy in line with the principle of subsidiarity. This has to be done by

[15] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, vol. 1155, Article 32.
[16] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 26, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.
[17] Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. *European Treaty Series* - No. 155 (1994), para. 19, https://rm.coe.int/16800cb5e9.

transforming the relationship of the ECtHR with the national courts from a hierarchical to a cooperative one.[18]

Several protocols to the ECHR, namely the protocols No. 11, 14, 14bis, 15 and 16, were adopted for the implantation of the Convention system reforms. The protocols No. 11 and 14 introduced the procedural reforms, while the Protocol No. 15, similarly to the Protocol No. 16, was aimed at the enhancement of the involvement of the national courts in the protection of human rights.

The Protocol No. 11 was the first fundamental step in the reforms of the Convention system. It abolished the European Commission of Human Rights and provided a right for the individuals to bring the cases directly to the Court. In other words, this protocol established the ECtHR as a full-time court and fully recognized the right of the individual petitions.

After the entry into force of the Protocol No. 11, it became clear that it would fail to achieve its goals and the Court's workload would become even higher. Consequently, in order to enhance the effectiveness of the reforms initiated by the Protocol No. 11, the Protocol No. 14 was adopted. According to this protocol, the Court should play a role of a 'filter'. This means that not all the applications can reach the Strasbourg now. For instance, the Protocol No. 14 created single-judge panels that have a right to reject obviously inadmissible applications.[19] Moreover, it introduced an additional admissibility criterion, which allows the ECtHR to declare an application inadmissible if the applicant has not suffered a 'significant disadvantage'.[20] Finally, the competence of three-judge panels created by the Protocol No. 14 was expanded: now they have a power to declare an application admissible and to decide a case on the merits if its essence is subject to a well-established case law.[21]

The Protocol No. 14, however, did not enter into force for several years due to the lack of ratifications. The new single- and three-judge panels were introduced only by the Protocol No.14bis, which was perceived as a measure, which had to solve the deadlock surrounding the adoption of the Protocol No. 14.

The reforms introduced by the protocols No.No. 11, 14 and 14bis appeared to be ineffective and the need to cope with the problems in the Convention system remained. Further

[18] Thomas Voland and Britta Schiebel. "Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?" *Human Rights Law Review* 17, no. 1 (2017): 74, https://doi.org/10.1093/hrlr/ngw034.
[19] Article 8 Protocol No. 14 provides: "Article 28 of the Convention shall be amended to read as follows: "[…] In respect of an application submitted under Article 34, a committee may, by a unanimous vote declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; […]."
[20] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. *CETS* 194 (2004), Article 12(b). https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680083711.
[21] *Ibid*., Article 8.

proposals on the reforms were discussed during the Interlaken, Izmir and Brighton conferences and were enshrined in the corresponding declarations that emphasized a new guiding principle – the principle of subsidiarity, which 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 Court. The Court can and should intervene only where the domestic authorities fail in that task."[22] So, the main idea of further reforms was the shared responsibility of the Court and the HCPs for realizing the effective implementation of the Convention.

In order to elaborate the principle of subsidiarity, the Protocol No. 15 was adopted. Its special significance lies in Article 1 that provides for the insertion of a new recital to the Preamble of the Convention and which states 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 defined 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 European Court of Human Rights established by this Convention."[23] The Brighton Declaration stressed that this recital was necessary 'for reasons of transparency and accessibility'.[24]

The Protocol No. 15 contains, however, only a declaration of the principle of subsidiarity and does not provide the means for its practical implementation. In order to put this concept into practice, the Protocol No. 16 was adopted.

So, the main reason for the adoption of the Protocol was the Court's overload[25] and the need to ensure practical implementation of the principle of subsidiarity that was prescribed by the Protocol No. 15. Among the reasons for the Court's overload in turn is, for example, the sharp increase in the number of the High Contracting Parties (for instance, 19 States ratified the Convention during the 1990s and membership of the Convention system rose from 22 to 41 states); lengthened average time of processing the applications; and the significant number of the applications concerning the systematic violations.[26] In the Group of Wise Persons' opinion, mechanism prescribed by the Protocol No. 16 would foster the dialogue between the national

[22] "Interlaken Follow-Up: Principle of Subsidiarity. Note by the Jurisconsult." European Court of Human Rights, 2010: 2, http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[23] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. CETS 213 (2013), Article 1, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084831.
[24] Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, para. 12(b), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[25] See, for example, European Court of Human Rights, "Analysis of statistics 2018." (2019): 7, https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf.
[26] European Court of Human Rights, *"The European Court of Human Rights in Facts and Figures 2018."* (2019), 10-11, *https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf.*

courts and the Court, and enhance the ECtHR's constitutional role.[27] The idea is that the national courts will receive the guidelines on the application of the Convention and its protocols and, as a result, their application on national level will become more objective. This should lead to a fewer number of the individual applications submitted to the Court since the individuals will not have the reasons to appeal the decisions of the national courts.

1.2. History of Adoption

As was mentioned above, the idea of the extended advisory jurisdiction of the Court was for the first time expressed in the Wise Person's Report in 2006. The proposal to extend the advisory opinion jurisdiction was made in the interest of "institutionalising the links between the [ECtHR and highest national courts]"[28]. This proposal was later examined by the Steering Committee for Human Rights (CDDH) as part of its work on follow-up to the above-mentioned Report.[29] Further discussions on the merits of extending the Court's advisory jurisdiction continued in the Council of Europe committees and were driven primarily by Norway and the Netherlands.

In order to further develop the proposals made by the Group of Wise Persons, several High-Level Ministerial conferences were organized: Interlaken (2010), Izmir (2011) and Brighton (2012). The idea of the extended advisory jurisdiction of the Court was not discussed during the Interlaken conference though. It was included only in the proceedings of the Izmir and Brighton conferences. The Izmir High-level Conference on the future of the Court (26-27 April 2011), in its final Declaration, "[invited] the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations".[30] As a result of the conference, the CDDH was invited to elaborate the specific proposals to introduce such a procedure and in 2012, in its Final

[27] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 81, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.
[28] *Ibid*., para. 79.
[29] See Activity report "Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights." CDDH 68th meeting, Strasbourg, 24-27 March 2008, doc. CDDH(2009)007, para. 42-44; "Opinion on the issues to be covered at the Interlaken Conference." CDDH 69th meeting, 24-27 November 2009, doc. CDDH(2009)019
CDDH Opinion on the issues to be covered at the Interlaken Conference, doc. CDDH(2009)019 Addendum I, para. 19.
[30] Izmir Declaration. High Level Conference on the Future of the European Court of Human Rights, 26-27 April 2011, Part D, para. 4, https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

Report to the Committee of Ministers on measures requiring amendment of the ECHR, the CDDH conducted an in-depth analysis of the proposal made by the experts of Norway and the Netherlands.

Further reflection on the proposal to extend the ECtHR's advisory jurisdiction was the inclusion of the issue into the agenda of the Brighton High-level Conference on the future of the Court (19-20 April 2012). During the Conference the Court submitted its Reflection Paper on the proposal to extend the Court's advisory jurisdiction admitting that the aim of the idea to extend advisory jurisdiction of the Court is to reinforce the implementation of the Convention of the domestic in level accordance with the principle of subsidiarity.[31]

The final Declaration of the Brighton Conference

> [noted] that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties. […][32]

All the Member States of the Council of Europe adopted the Brighton Declaration (hereinafter the Declaration) on April 20, 2012. The purpose of the Declaration was to suggest the new measures that would ensure that the Convention system remains effective in the implementation of its function of the human rights protection. So, roughly speaking, the Declaration became a draft for the future Protocol No. 16.

First of all, the Declaration affirmed the Contracting Parties' 'deep and abiding commitment' to the Convention.[33] Secondly, in this Declaration, the member states of the Council of Europe reaffirmed their believe that the right of the individual applications to the ECtHR is a essential element of the system of the protection of rights and freedoms provided by the Convention.[34] This provision found its reflection in the Explanatory Report to the Protocol No. 16 that stipulates that an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party "[…] would not prevent a party to that case subsequently exercising their right of individual application […]".[35] At the same time, the Declaration contains some recommendations, e.g., to reduce the time limit for applying to the

[31] European Court of Human Rights "Reflection paper on the proposal to extend the Court's advisory jurisdiction." 2013, para. 2, https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.
[32] Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, para. 12(b), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[33] *Ibid*., para 1
[34] *Ibid*., para. 2
[35] Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. *European Treaty Series* - No. 155 (1994), para. 26, https://rm.coe.int/16800cb5e9.

court from six to four months[36] or to encourage a stricter application of the admissibility criteria[37], which arguably would diminish the right of individual application. In order to further develop the principle of subsidiarity, the Declaration provides several recommendations on how the HCPs can implement the Convention on the national level more effectively, e.g., to provide public officials with a training on how to fulfil their obligations under the Convention; and to consider the introduction of new domestic legal remedies[38].

The Brighton Declaration emphasized also the shared responsibility of the HCPs and the Court for the implementation and enforcement of the Convention based on the principles of subsidiarity and the margin of appreciation.[39] Herewith, the Declaration stated that both these principles should be given more prominence by the Court.[40]

The main goal of the reforms taking place in the Convention system is to ensure the decrease in the number of the applications pending before the ECtHR. In this regard, the Declaration emphasised that the workload of the Court should be reduced by ensuring the further secondment of national judges[41], developing the pilot judgement procedure[42], and considering the implementation of some procedural changes, e.g., introduction of the online applications[43].

Furthermore, the Declaration indicates that the Brighton Conference is only the beginning of the Convention system reforms stipulating that "it may be necessary to evaluate the fundamental role and nature of the Court to ensure the viability of Court's key role in the system for protecting and promoting human rights in Europe".[44]

Finally, the Declaration envisages the drafting of a protocol that will enable the Court to deliver the advisory opinions upon the HCPs' requests.[45] According to Dzehtsiarou & Noreen O'Meara, the advisory opinion mechanism, as it was presented in the Brighton Declaration, could have the greatest influence on the Court's relationship with the national courts.[46] Herewith, the Declaration has provided for only a minimal guidance on how the optional protocol introducing

[36] Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, para. 15(a), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[37] *Ibid*. para.15(b).
[38] *Ibid*., para. 9(c(v)).
[39] *Ibid*. para. 3.
[40] *Ibid*. para. 12(a).
[41] *Ibid*. Para. 20(b).
[42] *Ibid*. Para. 20(c).
[43] *Ibid*. Para. 20(g(i)).
[44] *Ibid*. Para. 31.
[45] *Ibid*. Para. 12(d).
[46] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 456.

the advisory opinions mechanism should be drafted. This gave the CDDH a wide range of actions with regard to the drafting process.

At the end, the Declaration "[…] [invited] the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it".[47]

As a result, the Committee of Ministers on its 122nd Session on May 23, 2012 instructed the CDDH to draft the text of the Protocol No. 16. The key issues addressed during this process were: the nature of the domestic authorities that may request an advisory opinion; the type of questions on which the Court may give an advisory opinion; the procedure for considering the requests and for issuing the advisory opinions; and the legal effect of the advisory opinions on the subsequent cases. All these issues were later included into the Protocol.

On June 28, 2013 the Opinion No. 285 (2013) on the Draft Protocol was adopted and on October 2, 2013 the draft text without any amendments done was adopted as the Protocol No. 16 to the European Convention on Human Rights.

1.3. Aims of Protocol No. 16

As it was mentioned above, the adoption of the Protocol No. 16 was a part of the broader reforms aimed at elimination of the Court's workload. So, the primary aim of the Protocol is to reduce the number of the individual applications pending before the Court. In the course of these reforms, the Protocol No. 16 has its narrow task of practical implementation of the principle of subsidiarity.

It is stated in the preamble of the Protocol: "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 the implementation of Convention, in accordance with the principle of subsidiarity."[48] The Guidelines on the implementation of the advisory opinion procedure introduced by the Protocol No. 16 to the Convention confirm the provisions of the preamble and in para. 2 of the Guidelines, it is stated: "the aim of the advisory opinion procedure is to further the interaction between the Court and the national courts and tribunals of the

[47] Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, para. 12(d), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[48] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), recital 3, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

Contracting Parties to the Convention. The promotion of constructive dialogue between the Court and the national courts and tribunals serves to strengthen further the implementation of the Convention at the domestic level, in line with the principle of subsidiarity."[49]

Another important fact that is worth mentioning is that the aim of the advisory opinion procedure is not to solve a case on the level of the ECtHR itself, but to provide the guidelines for the national courts on the implementation of the Convention and its protocols and thus, to ensure effective solution of the case on the national level. The latter is explicitly mentioned in the Explanatory Report to the Protocol, namely it is stated in para. 11: "[the aim of the procedure, is] not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it".[50] The Izmir High-level Conference on the future of the Court, in its final Declaration, "[invited] the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations". [51] The same is evidenced by the Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, which states in para. 8: "The Court should not be called upon to review the facts or the national law in the context of this procedure. Nor is it for the Court to decide the case pending before the requesting court."[52]

Consequently, there are 2 goals of the Protocol No. 16 can be distinguished. The first one is the enhancement of the dialogue between the ECtHR and the national courts. The second goal is a consequence of the first one and is to reinforce the implementation of the Convention on the national level. All this together is about to ensure the principle of subsidiarity, which should lead to a reduction in the number of the applications submitted to the Court because the majority of the disputes will be successfully reviewed on the national level.

[49] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 2, accessed 2019 May 5, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf

[50] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series* No. 214 (2013), para. 11, https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[51] Izmir Declaration. High Level Conference on the Future of the European Court of Human Rights, 26-27 April 2011, Part D, https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

[52] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 8, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.

1.4. Characteristic of main Provisions of Protocol No. 16

The creators of the Protocol No. 16 were inspired by the preliminary reference procedure provided for by Article 267 of Treaty on the Functioning of the European Union. They, however, refused to copy that procedure without making any corrections, considering that this may cause significant legal and practical problems and, thus, would only increase the workload of the Court.[53] Judicial control established by the Convention requires the domestic remedies to be exhausted before applying to the Court[54] and transposition of a procedure identical to the preliminary reference one into the Council of Europe will contradict to the principle of exhaustion of domestic remedies and subsidiary character of the Convention system.

With regard to the provisions of the Protocol No. 16, the Group of Wise Persons stated that the advisory opinion procedure should be subject to strict conditions in order to avoid additional burden on the Court.[55] I would like to derive 3 key features of the advisory opinion procedure. First of all, it is a non-binding nature of the procedure, which corresponds to the principle of subsidiarity and manifests itself on three levels. First, the national courts are not obliged to request the advisory opinions form the Court.[56] This means that a decision whether to ask for an advisory opinion falls within the jurisdiction of the national courts. Moreover, they have a right to withdraw their requests after notifying the Registrar on their withdrawal.[57] Second, the ECtHR is not obliged to provide a referring court with an advisory opinion.[58] This means that the Court may refuse to give its opinion upon the request. This provision is a matter of concern though, which I will discuss later on. Third, the national courts are not bound by the advisory opinions issued by the Court.[59] So, it seems that the efficiency of the mechanism will largely depend on the desire of the national courts to follow up the advisory opinions issued upon their requests. This is another matter of concerns, with which I will deal later on.

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[53] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 80, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.

[54] Article 35 ECHR provides: "The Court may deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the nal decision was taken."

[55] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 85, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.

[56] Article 1(1) Protocol No.16 provides: "Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto."

[57] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", Appendix I Chapter X Rule 92 para. 2.3, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf

[58] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 2, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

[59] *Ibid*., Article 5.

The second key feature of the Protocol No. 16 concerns the national authorities that can make a request to the Court and Article 1(1) prescribes that this is should be 'highest court or tribunal'.[60] The use of the term 'highest' instead of 'the highest' allows to include not only the courts or tribunals which are the highest in the whole judicial system of a state, but also the courts or tribunals which are the highest only for a particular category of the cases. Herewith, the Protocol does not provide a list of the courts and tribunals that can ask for an advisory opinion. The obligation to provide such a list, which, by the way, can be changed at any time, lies on the High Contracting Parties.

According to the Explanatory Report the term 'high court or tribunal' was used by the drafters in order to provide parties with a certain freedom of choice and, thus, to avoid problem in the functioning of the domestic legal systems.[61] So, this provision was adopted so as to take into account the particularities of different legal systems.

The last thing that should be mentioned with regard to the above-mentioned provision is that, as well as the previous one, it is in accordance with the principle of subsidiarity prescribed by Article 35 of the Convention, which entrusts the contracting parties with the primary responsibility for the protection of human rights.[62]

The third main provision of the Protocol concerns the subject matter of the advisory opinions. Article 1(1) defines it as "[…] questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto".[63] The Guidelines on the implementation also state that this should be a question that a requesting court finds necessary for the consideration of the case on the national level.[64] Therefore, the interpretation of this definition is a task for the Court when deciding whether to accept a request for an advisory opinion.

There is nothing mentioned in the Protocol with regard to the situations when a national court may request an advisory opinion. The Guidelines, nevertheless, give some examples of such situations. These are, for instance, situations when:

1) the case before a national court raises a novel point of Convention or its protocols; or

2) the Court's case law cannot be applied to the facts of the case directly; or

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[60] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 1(1), https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

[61] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series* No. 214 (2013), para. 8, https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[62] See, for example, *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V; *Akdivar v. Turkey* [GC], no. 21893/93, ECHR 1996.

[63] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 1(1), https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

[64] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 6.2, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

3) there seems to be an inconsistency in the Court's case law, etc.[65]

Since there are no clear provisions in the Protocol with regard to the questions, which can be a subject of a request for an advisory opinion, it will become clearer from the Court's case law. For instance, the first request for an advisory opinion concerned a question of surrogacy and civil registration of children born by surrogate mother in another state, where the surrogacy is considered legal unlike in the State where the civil registration is requested. This issue is not well regulated across the Europe.[66] However, the number of the cases when children are being born by surrogate mothers increases. Article 8 ECHR provides the HCPs with a margin of appreciation in questions like this one and it is highly needed to ensure that the States do not abuse this right. It is especially important in cases like this one, since it concerns a vulnerable group of people – children. In my opinion, this is exactly why the Court decided to accept the said request.

Herewith, a national court may seek an advisory opinion only with regard to a case, which is under its consideration. Moreover, it should give a reason for its request and to provide the relevant legal and factual background of the case in connection with the consideration of which it makes the request for the advisory opinion.[67] So, the question referring to the Court should not be a hypothetical one. These requirements serve to enable the ECtHR to focus on the relevant questions of general interest in order to prevent further workload of the ECtHR.

The last thing I would like to mention with regard to the provisions of the Protocol is that the Protocol does not introduce new provisions to the Convention and the acceptance of the Protocol is optional for the HCPs and each High Contracting Party should decide whether to accept the provisions of the Protocol No. 16 or not. Consequently, if a HCP accepts the Protocol, its provisions will become additional to the ECHR for that particular state and no other state will be bound by it.

[65] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 5, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.
[66] *Mennesson v. France, no. 65192/11 ECHR 2014-III (extracts),* para. 78 provides: "[…] surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others."
[67] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 1(3), https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

1.5. Summary

At the beginning of the 21st century it became clear that the European Court of Human is going to become a victim of its own success. Having proved itself as an effective judicial way of the human rights protection, it faced a huge number of the individual applications submitted for its consideration. In order to prevent the collapse of the Convention system, a series of reforms was taken. All of these reforms were aimed at the decrease of the number of the individual applications pending before the Court.

In 2013, the Protocol No. 15 to the ECHR was adopted. It prescribes the principle of subsidiarity according to which the main responsibility of the human right protection lies on the national courts. In order to give an action to this principle, the Protocol No. 16 to the ECHR was also adopted in 2013. The idea of the Protocol No. 16 is to develop a judicial dialogue between the European Court of Human Rights and highest national courts and tribunals of the High Contracting Parties by providing the latters with a right to request the advisory opinions from the ECtHR. The idea is that such a procedure will enhance the objectiveness and thus, the effectiveness of the human rights protection on the national level. This, as a result, should lead to a fewer number of the individual applications submitted to the Court. The Protocol is, however, the optional one and the advisory opinion procedure is obligatory neither for the national courts and tribunals, nor for the Court itself; and the advisory opinions issued by the Court are non-binding for the referring courts and tribunals.

2. ADVISORY OPINION PROCEDURE IN THE CONTEXT OF HUMAN RIGHTS PROTECTION IN THE EU

The aim of the Master Thesis is not simply to analyse the Protocol No. 16, but to establish its possible impact on the human rights protection in the context of the EU legal order.

First of all, I will analyse the effect the advisory opinion procedure will have on the national courts and tribunals. Namely, I will prove that despite the non-binding nature of the advisory opinions, the national courts and tribunals will apply them while taking the decisions in national legal proceedings. Moreover, I will analyse how this procedure will coexist with the function of the constitutional control performed by the Constitutional Courts of the HCPs that have already ratified the Protocol or will do this in future.

Secondly, the preliminary reference procedure, which is prescribe by Article 267 of the Treaty on the Functioning of the European Union, has become a prototype of the advisory opinion mechanism and it proved itself as an effective toll for achieving the goals set for it. These two procedures at first sight look alike. I will conduct a comparative analysis of the advisory opinion and the preliminary reference procedures in order to assess whether the application of the Protocol will have the same success.

Thirdly, I will examine whether the Protocol No. 16 to the ECHR could become an effective tool for ensuring the dialogue between the national courts and the ECtHR; for practical implementation of the principle of subsidiarity; and thus, for decreasing the number of the individual applications submitted to the Strasbourg. For this purpose, I will conduct an in-depth analysis of the provisions of the Protocol and will establish its strengths and weaknesses.

Finally, the CJEU believe that the co-existence of the advisory opinion and the preliminary reference procedures would undermine the autonomy of EU law.[68] I will pay special attention to the CJEU's Opinion 2/13 in order to understand whether it is indeed so and if yes, whether this autonomy can be put higher that the protection of human rights.

At the end of the analysis, I will come to the conclusion about the effect the advisory opinion procedure will have on the protection of human rights in the European Union and whether it will be an effective tool for enhancing this protection.

[68] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 196, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.

2.1. The role of the Advisory Opinions for the National Courts

As I have already mentioned, the idea of the advisory opinion procedure, as of a mechanism designed to decrease the Court's overload with the individual applications, is that with the help of the guidance provided by the ECtHR the protection of human rights on the national level will become more objective and effective and this will leave no reasons for the individuals to ask the Court to deal with their applications. The main concern with regard to the possibility of the Protocol to become an effective tool for the human rights protection is a non-binding nature of the advisory opinions issued by the Court upon the national courts' requests.

National courts have an obligation to secure the rights provided in the Convention[69], in particular through carrying out their function of review and decision-making according to Articles 6, 13 and 35(1) ECHR. In order to ensure successful fulfilment of this function, the national courts have another obligation, namely to interpret domestic laws in the conformity with the Convention and relevant ECtHR's jurisprudence. In *Storck v. Germany* the Court held, for example, that "[the national courts] are obliged to apply the provisions of national law in the spirit of [ECHR] rights' and that '[failure] to do so can amount to a violation of the Convention imputable to the State […]".[70] This does not, however, mean that the national courts should refer to the provisions of the Convention in their decisions, but to apply the national laws 'in a Convention-friendly way'[71]. For that purpose, they should understand the essence of the Convention and what its provisions really mean.

Despite the interpretation of the Convention and its protocols provided in the advisory opinions is not binding for the HCPs, it provides the ECtHR with a possibility to express its position with regard to the questions of principal importance in the most authoritative judicial forum.[72] So, the advisory opinions, like other rulings of the Court, provide an authoritative statement of the Court on the standards of the protection of rights and freedoms guaranteed by the Convention, which should be taken into account in the process of interpretation of laws by the courts or tribunals on the national level.[73] The advisory opinions will provide a national court with a better understanding of what is meant under the provisions of the Convention and its protocols

[69] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950), Article 1.
[70] *Storck v. Germany*, no. 61603/00, ECHR 2005-V.
[71] Amrei Müller, "Domestic authorities' obligations to co-develop the rights of the European Convention on Human Rights." *The International Journal of Human Rights* 20, no. 8 (2016): 1058-1076. https://doi.org/10.1080/13642987.2016.1242301.
[72] Thomas Voland and Britta Schiebel. "Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?" *Human Rights Law Review* 17, no. 1 (2017): 79, https://doi.org/10.1093/hrlr/ngw034.
[73] Ada Paprocka and Michał Ziółkowski, "Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights." *European Constitutional Law Review* 11, no. 2 (2015): 290, https://doi.org/10.1017/S1574019615000176.

and, thus, will ensure that a judgement of the national court will be similar to the decision of the court, which it would have taken if it had considered the application. This, in turn, will provide the individuals with the assurance that the decisions of the national courts and tribunals are accepted in accordance with the Convention and their rights, thus, are protected in the best way possible.

Moreover, domestic law should be interpreted and applied in an up-to-date fashion.[74] The circumstances are being changed and it can appear that the previous case law and the previous interpretation of the Convention and its protocol do not correspond to the today's reality. Consequently, a national court may refer to the Court, which will provide it with the recommendations on the application of the Convention in an up-to-date manner.

The idea of the Protocol No. 16 is based on a presumption of a positive attitude of the HCPs towards the Court. However, in the last years it appears that the national authorities of some HCPs are rather critical towards the Court.[75] The idea of the institutional dialogue and of partnership between the ECtHR and the national courts in those states hardly seems to be realistic. Even more, it is hardly likely to expect that those states will even ratify the Protocol. With regard to those HCPs that will do this, there is a risk that their intentions stem from the political and strategic motives rather than from a desire to deepen the institutionalised dialogue with the Court. For instance, the national courts may abuse the right granted to them by the Protocol and refer to the ECtHR with the delicate and politically sensitive issues, decisions on which they prefer not to take on themselves.[76]

Nevertheless, the Explanatory Report in para. 27 stressed out that "[Advisory opinions] would, however, form part of the case-law of the Court, alongside its judgments and decisions. 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."

In the Reflection paper on the advisory opinion procedure, the Court also mentioned that its opinions "may [...] be of comparable significance to the Court's leading judgments and foster a harmonious interpretation of the minimum standards set by the Convention rights"[77] and that its opinions would have "undeniable legal effects"[78].

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[74] Eirik Bjørge, "National Supreme Courts and the Development of ECHR Rights", *International Journal of Constitutional Law* 9, no. 1 (2011): 5. https://doi.org/10.1093/icon/mor018.

[75] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 646, https://doi.org/10.1177/1023263X1402100404.

[76] Ibid., 646-647.

[77] European Court of Human Rights "Reflection paper on the proposal to extend the Court's advisory jurisdiction." 2013, para. 5, https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.

[78] *Ibid*., para. 44.

This means that the Court itself is bound by the advisory opinions issued by it and should apply them in its further judgments. Moreover, this could also mean that the advisory opinions, similarly to the ECtHR's judgements, will have *res interpretata* effect, which means that a well-established interpretation of the terms and notions of the ECHR given by Court forms a part of the Convention[79]. So, the Court's interpretations given in the advisory opinions can be considered to be *de facto* binding since the HCPs are obliged to comply with the provisions of the Convention and its protocols (if ratified by them) as it is explained by the Court in its judgements.[80] Even more, if a national court does not apply the interpretations given by the Court, it could be considered as the one that violated the obligations imposed on it by the Convention.[81] The above-mentioned statement will apply not only to the courts that request an opinion, but also the courts in the HCPs, which have chosen not to ratify the Protocol No. 16.

However, it should be born in mind that not an entire advisory opinion will have such an effect. The advisory opinion will provide general interpretations of the Convention provisions that will have *res interpretata* effect for the requesting state as well as for any other HCP; and advice on the concrete application of the Convention and its protocols to the facts of the particular case that will be non-binding.

Thus, notwithstanding their non-binding status, the advisory opinions delivered under the Protocol No. 16 will influence judicial decision-making in the Strasbourg and at the national level, namely by enhancing the quality of the national adjudication in relation to the Convention.

In order to support these statements, I would like to recourse to the motivation of some of the HCPs for ratification of this Protocol. So, on September 2, 2015, Lithuania has become one of the first countries to ratify the Protocol No. 16. Minister of Justice of Lithuania, Juozas Bernatonis, believes that the Protocol No. 16 will strengthen the interaction of the ECtHR and with the national authorities and will be an effective tool for the better protection of human rights in Lithuania.[82]

France became the 10th State that ratified the Protocol No. 16. This allowed the Protocol to entry into force on August 1, 2018. Emmanuel Macron, the President of the French Republic, on October 31, 2017 delivered his speech at the ECtHR in which he expressed his assurance that the Protocol will further strengthen the dialogue between the national courts and the ECtHR and,

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[79] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 635, https://doi.org/10.1177/1023263X1402100404.
[80] *Ibid*.
[81] *Ibid*., 636.
[82] Ministry of Justice of the Republic of Lithuania, http://www.tm.lt/naujienos/pranesimasspaudai/2238.

by providing the option of requesting an advisory opinion before an individual application is submitted directly to the Court, the Protocol will allow the dialogue to be better organised. Moreover, he believes that the advisory opinion procedure will strengthen the European judicial foundations in the area of human rights protection and will lead to the collective progress in this area.[83]

Ministry of Foreign Affairs of Georgia finds the Protocol No. 16 not only as a mean to strengthen the dialogue between the national courts and tribunals and the Court, but also as a Georgia's commitment to put into practice the ECHR high standards of human rights protection incorporated into the case law of the Court.[84]

From such a perception of the Protocol it follows that the HCPs are ready to take the extra measures to ensure that human rights are properly protected. So, they realise that the main aim of the Protocol is to ensure practical implementation of the principle of subsidiarity and they are ready to contribute to such implementation by assuring the protection of human rights on the national level.

2.2. Advisory Opinion Procedure and Constitutional Courts

To begin with, there are two categories of the functions of the national courts with regard to the Convention, namely the interpretation of the domestic legislation in conformity with the Convention and the review of the domestic legislation deemed to conflict with the Convention. The second category can be divided into the control of conventionality, usually performed by the ordinary courts, and the control of constitutionality usually performed by the Constitutional Courts.[85] The Protocol No. 16 provides that the requests for the advisory opinions can be submitted to the ECtHR by highest national courts and tribunals and the list of those courts and tribunals should be provided by the national authorities of a particular state.[86] Despite the Protocol does not require these courts and tribunals to be placed on the highest position in the judicial hierarchy, e.g.,

[83] ECtHR, Speech by Emmanuel Macron, President of the French Republic, at the European Court of Human Rights on 31 October 2017, 6, https://www.echr.coe.int/Documents/Speech_20171031_Macron_ENG.pdf

[84] "Ratification instruments of Protocols No.15 and No.16 has been deposited to the Council of Europe." Ministry of Foreign Affairs of Georgia. July 7, 2015. Accessed 17 November 2019, http://mfa.gov.ge/News/ევროპის-საბჭოს-მე-15-და-მე-16-ოქმების-სარატიფიკაცი.aspx?CatID=5&lang=en-US.

[85] Maria Dicosola, Cristina Fasone and Irene 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." *German Law Journal* 16, no. 06 (2015), 1393. https://iris.luiss.it/retrieve/handle/11385/166264/36490/GLJ_Vol_16_No_06_Dicosola_Fasone_Spigno.pdf

[86] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Articles 1, 10, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

to be the Constitutional Courts (hereinafter the CCs), this also could be the case. In this context it is worth mentioning that the Constitutional Courts are considered to be one of the ultimate guarantors of the constitutional rights at the domestic level in most High Contracting Parties[87], however, the Protocol does not take their special status into account and does not provide them with any special treatment in case they are entitled with a right to ask for the advisory opinions. Moreover, the Protocol does not consider the internal relations of the national courts, namely the CCs and the Highest Ordinary Courts (hereinafter the HOCs). In this regard some questions may arise. For instance, whether the advisory opinion procedure will affect the powers of the Constitutional Courts and if yes, then in which way; and whether it will influence the internal relationship between the HOCs and the CCs.

Control of constitutionality implies that a CC should review the provisions of national law that allegedly violates the Convention and the CC has a right to cancel a decision of a HOC if it finds it as violating the provisions of the Convention. So, in this case, the HOC and the CC are mutually related as the supervisees and the supervisors.[88] It is worth, however, mentioning that not all the states have this type of the constitutional control in their system of constitutional justice. Thus, the problems to be described below will not be inherent in all the states. Moreover, the problems like these ones do not arise in the states where, for example, a HOC is the court of the last resort for both the review of constitutionality and conventionality.[89]

So, talking about the HCPs where a system of the control of constitutionality of legislation is provided, e.g., Slovenia, Lithuania, France, Italy, etc., the mutual relations of the Highest Ordinary Courts and the Constitutional Courts are burdened with tensions that are inherent in such a system because they are structural in nature and any external power that affects this relations can lead to structural disorders in this system.[90] However, the Protocol No. 16 seems to be such a power that could affect the relations of the aforementioned courts. For instance, an overlap of the competencies may occur when a request for an advisory opinion is submitted to the ECtHR and the incidental

[87] Maria Dicosola, Cristina Fasone and Irene 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." *German Law Journal* 16, no. 06 (2015), 1404. https://iris.luiss.it/retrieve/handle/11385/166264/36490/GLJ_Vol_16_No_06_Dicosola_Fasone_Spigno.pdf.
[88] Jasna Omejec, "STUDY ON EUROPEAN CONSTITUTIONAL COURTS AS THE COURTS OF HUMAN RIGHTS: Assessment, challenges, perspectives." Study prepared for the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions, Bali, Indonesia, April 2016, 34, https://bib.irb.hr/datoteka/796420.OMEJEC_-_European_Constitutional_Courts_as_the_Courts_of_Human_Rights.pdf.
[89] Maria Dicosola, Cristina Fasone and Irene 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." *German Law Journal* 16, no. 06 (2015), 1404-1405, https://iris.luiss.it/retrieve/handle/11385/166264/36490/GLJ_Vol_16_No_06_Dicosola_Fasone_Spigno.pdf.
[90] Jasna Omejec, "STUDY ON EUROPEAN CONSTITUTIONAL COURTS AS THE COURTS OF HUMAN RIGHTS: Assessment, challenges, perspectives." Study prepared for the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions, Bali, Indonesia, April 2016, 34, https://bib.irb.hr/datoteka/796420.OMEJEC_-_European_Constitutional_Courts_as_the_Courts_of_Human_Rights.pdf.

question of constitutionality is referred to the Constitutional Courts.[91] For example, in Italy, on the basis of the indirect mode of access (the individuals there do not possess a right to refer the to the Constitutional Court directly) a question of compliance with the Convention is converted into a matter of compatibility with the Constitution. At the same time, the Italian Constitution is also equipped with the significant Bill of constitutional rights.[92] So, the violation of the Convention can turn into indirect violation of the corresponding provisions of the Italian Constitution. Basing on this, the Italian Constitutional Court has clarified that a conflict arising between the national legislation and the Italian Convention must be considered as a constitutional question and submitted to the Constitutional Court in accordance with Article 117 (1) of the Italian Constitution.[93] Moreover, from the above-mentioned article it follows that the Italian Constitution is posed higher than all the international treaties to which Italy is a party, including the ECHR that has a status of ordinary law there.[94] This is contrary to the very nature of the Convention though. Nevertheless, the Protocol No. 16 may interfere into the realisation by the CC of its function of constitutional control. Namely, by empowering the highest court and tribunals, other than the CC, with a possibility to refer a question of constitutionality of a particular norm corresponding to a norm of the Convention to the ECtHR, while they have to address that question to the CC. If this is the case, the risk that the use of the advisory opinions mechanism will encourage the HOCs to proceed to disputable operations of consistent interpretation in order to apply the interpretive elements offered by the ECHR without subsequently involving the Constitutional Court may increase.[95] Consequently, the CC will not be able to perform its function of ensuring the compliance of national laws with the ECHR through the constitutional review and to establish the prevalence of the level of the protection guaranteed by the Constitution once all the relevant interests and values concerned were taken into account.[96]

A Constitutional Court itself, if empowered with a right to make the requests for the advisory opinions, "could limit its attitude towards referring to the ECtHR, while at the same time gradually

[91] Giovanni Zampetti, "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." Discussion Paper No 2/18, Europa-Kolleg Hamburg, Institute for European Integration, 2018, 22, https://europa-kolleg-hamburg.de/wp-content/uploads/2018/10/DP_02-18_Giovanni-Zampetti.pdf.
[92] *Ibid*., 22
[93] Italian Constitutional Court, Decisions No. 348 and 349 of 24 October 2007. Cited from: Giovanni Zampetti, "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." Discussion Paper No 2/18, Europa-Kolleg Hamburg, Institute for European Integration, 2018, 23, https://europa-kolleg-hamburg.de/wp-content/uploads/2018/10/DP_02-18_Giovanni-Zampetti.pdf.
[94] Giovanni Zampetti, "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." Discussion Paper No 2/18, Europa-Kolleg Hamburg, Institute for European Integration, 2018, 24, https://europa-kolleg-hamburg.de/wp-content/uploads/2018/10/DP_02-18_Giovanni-Zampetti.pdf.
[95] *Ibid*., 26.
[96] *Ibid*.

reacting to the tendency towards being stricter in giving precedence to the balances of the constitutional rights and interests as resulting primarily, if not only, from the Constitution".[97]

Moreover, if a CC does not have a right to refer to the Court for an advisory opinion, but still performs the constitutional control, some other problems may occur. Firstly, a HOC submits its request for an advisory opinion and follows that opinion while taking a decision in the case with regard to the consideration of which the request was submitted. Then, a constitutional complaint is filled against that decision. As a result, the CC has two decisions: either to follow the opinion, thereby confirming a pure loss in terms of the interpretative powers regarding the assessment of the compliance of national legislation with the Convention; or disregard the opinion, thus, further enhancing the internal level of the protection, while in this way, however, creating a situation of tension with the ECtHR.[98] However, the nature of the Convention implies that the national courts of the HCPs take into account the 'substance' of the ECtHR's case law while considering the claims on the national level. The Constitutional Court of Italy confirms the same.[99] On this basis, the national courts, and the Constitutional Courts as well, are required to interpret internal law in compliance with the Convention[100], thus, having in mind also the opinions of the Court issued according to the Protocol. So, it seems that the CCs will have to follow the opinions of the ECtHR. Moreover, as was mentioned above, the advisory opinions seems to have *res interpretata* effect for the national courts, including the Constitutional Courts. If a court does not follow an opinion though, an individual will have an opportunity to refer to the Court on the basis of Article 34 of the Convention. Thus, the Court will consider the same issue twice. Secondly, the HOCs might use the advisory opinion procedure in order to seek guidance in the Court's interpretations of the Convention and to narrow the discretion of the Constitutional Courts in the protection of fundamental rights through these interpretations given by an 'external' court.[101] So, in this situation, the Protocol No. 16 will create problems for intra-judicial relationship at the national level. So, the proper solution would be for the Contracting Party to determine by itself whether to give the precedence to the constitutional review of legislation or rather to requesting an advisory opinion.[102]

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[97] Giovanni Zampetti, "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." Discussion Paper No 2/18, Europa-Kolleg Hamburg, Institute for European Integration, 2018, 27, https://europa-kolleg-hamburg.de/wp-content/uploads/2018/10/DP_02-18_Giovanni-Zampetti.pdf.
[98] *Ibid*., 26.
[99] *Ibid*., 24.
[100] *Ibid.*
[101] Maria Dicosola, Cristina Fasone and Irene 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." *German Law Journal* 16, no. 06 (2015), 1405, https://iris.luiss.it/retrieve/handle/11385/166264/36490/GLJ_Vol_16_No_06_Dicosola_Fasone_Spigno.pdf
[102] *Ibid*.

So, it seems that the role of the Constitutional Courts can be limited by the use of the advisory opinion procedure. Consequently, it seems that it will be better if the national authorities, in those countries that have the constitutional control mechanism, indicate no any other but the Constitutional Courts as ones having a right to refer for the advisory opinions. Thus, the HOCs should be included into a list of the courts and tribunals entitled to refer for the advisory opinions only if their final decisions are not subject to the constitutional control performed by the Constitutional Court. Nevertheless, 3 out 7 (as for April 5, 2019) EU MSs (Lithuania, Romania and Slovenia) have already included their respective Constitutional Courts as well as some Highest Odinary Courts in the list of the courts and tribunals entitled to refer to the ECtHR with the requests for the advisory opinions. France included the Constitutional Council, which performs the functions similar to the functions of a Constitutional Court, to this list. All these MSs also included their Highest Ordinary Courts to this list.[103]

At the end of 2018, the first request for an advisory opinion was submitted to the ECtHR by the French Court of Cassation – the High Ordinary Court – and on April 10, 2019, the first advisory opinion was delivered. As I mentioned above, the French judiciary system is the one that has the mechanism of the constitutional control, performed by the Constitutional Council, which also has a right to submit its request for the advisory opinions. So, hopefully, soon it should become clearer how the relationships between the High Ordinary Courts and the Constitutional Courts will be settled, at least, in France.

2.3. Preliminary Reference Procedure Under the Court of Justice of the European Union

The Group of Wise Persons in its Report pointed out that the proposed advisory opinion procedure could be modelled on the preliminary reference procedure provided for in Article 267 of the Treaty on the Functioning of the European Union. Despite this, after having examined the preliminary reference procedure the Group of Wise Person came to the conclusion that its transposition into the Convention system does not seem to be suitable. The main reason for that was that this would contradict to Article 35 of the Convention. For instance, there is a risk that the preliminary reference procedure existing together with the exhaustion rule of Article 35 would

[103] "Reservations and Declarations for Treaty No.214 - Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Declarations in force as of 03/04/2019." Council of Europe. 3 April 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/declarations?p_auth=J5eI5Pcf.

create huge legal and practical problems and, thus, would only increase the Court's overload.[104] The European Court of Justice, in its turn, held that the Protocol No. 16 could undermine the autonomy of EU law and, consequently, the MSs of the EU and the Union as a whole should not accede to this Protocol.[105]

The preliminary reference procedure has proven itself as the procedure that has enabled the CJEU to develop a number of the important principles and doctrines of EU law, e.g., the supremacy and state liability[106] and is usually accepted as the procedure that contributes to the harmonization of EU law since the uniform interpretations of the CJEU should to be applied by all the national courts of the MSs.[107]

Given that the preliminary reference procedure became the basis for the advisory opinion procedure and that both of them provide that the court will provide its explanations of certain provisions, one may argue that the Protocol No. 16 will have the same success as Article 267 TFEU. In order to confirm or disprove this assumption, there is a need to conduct a comparative analysis of these two procedures in order to establish whether the advisory opinion procedure has those elements, which led the preliminary reference procedure to the success. Moreover, the aim of the Thesis is to evaluate the impact of the Protocol on the protection of human rights in the EU, so the necessity to compare these two procedures and to assess the results of their possible coexistence increases.

So, I will examine Article 267 TFEU and establish the main similarities and differences between the advisory opinion and the preliminary reference procedures in this subchapter.

2.3.1. Essence of the Procedure

Despite at first glance these two procedures seem to be alike, and the preliminary reference procedure even became the basis for the advisory opinion procedures, their very essence is, however, different.

Preliminary reference procedure is prescribed by Treaty on the Functioning of the European Union, which is considered to be a fundamental mechanism designed to guarantee the

[104] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 80, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.
[105] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 198-200, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.
[106] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 640, https://doi.org/10.1177/1023263X1402100404.
[107] Ibid.

interpretation and uniform application of EU law within the Union.[108] In order to ensure a proper fulfilment of this function, Article 267 TFEU prescribes:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

So, the reference for a preliminary ruling is not a lawsuit filed against an act of the European Union institutions, but one or more questions submitted by a national judge to the Court of Justice of the EU in order to apply EU law uniformly with the other EU Member States. Consequently, the CJEU does not take a decision in a dispute, in connection with the consideration of which the national judge made its reference, and does not directly apply EU law to it. Instead, it gives the answers to the questions raised before it and, thus, helps a national court to resolve the dispute in the main proceeding on the national level. The national court, in its turn, should take the decision in the case applying the findings of the CJEU by removing, where appropriate, the application of the national rules that were found incompatible with EU law.

The objective of the preliminary rulings, thus, is to guarantee the uniform interpretation and application of EU law between the Member States. It is worth mentioning that some authors[109] consider preliminary reference procedure as the best instrument for a national court to obtain an authentic interpretation of a European Union legislative act or to check its validity. They have established that the procedure has played a central role in the integration of the legal systems of the EU Member States and the development of the EU legal system as it presently stands.[110]

The purpose of the advisory opinions, on the contrary, is to provide the guidance to the national courts on the interpretation of the Convention and its protocols in order to ensure higher standards of the human rights protection by reducing the Court's workload and relying more responsibility on the national courts[111]. What is similar, though, is that both these procedures seek

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[108] Pascariu, Liana-Teodora. "The Reference for a Preliminary Ruling. CJEU Recommendations", 5 *Logos Universality Mentality Education Novelty: Law* 5, no. 1 (2017), 45, http://lumenpublishing.com/journals/index.php/lumenlaw/article/view/59/pdf.
[109] See for example, *Ibid*.
[110] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 640, https://doi.org/10.1177/1023263X1402100404.
[111] "LEGAL BRIEFING: Implementing ECHR Protocol 16 on Advisory Opinions." Open Society Justice Initiative, March 2016, para. 17. https://www.opensocietyfoundations.org/sites/default/files/briefing-echr-protocol-16-20160322.pdf.

to achieve their goals through the facilitation of cooperation with the national courts.

The preliminary reference procedure also implicitly gives the individuals an opportunity to access to the to the court, "when they have no *locus standi* to directly ask the CJEU to control the validity of the Union's acts."[112] This is, obviously, not relevant for the ECtHR since the right for the individual applications is a fundamental principle of the Convention.

2.3.2. Authorities Having the Right to Refer to the Relevant Court

Similarly to the Protocol No.16, only the national courts and tribunals of the Member States may ask for the preliminary rulings from the CJEU. In its case law, the CJEU has elaborated a definition of 'court' and 'tribunal'. It describes them as "any national judicial body, established by national law, independent, permanent, that has the power to apply national law and render a definitive decision legal rights and obligations, binding, after following an adversarial procedure and applying rules of law."[113] It is also worth mentioning that only the CJEU itself can establish whether a judicial body meets these criteria. Moreover, in its later judgment[114], the CJEU stated that in order to determine whether a national body can be qualified as a court in the meaning of Article 267 TFEU, "[…] it must be determined in what specific capacity, judicial or administrative, it is acting within the particular legal context in which it seeks a ruling from the Court, in order for it to be ascertained whether there is a case pending before it and whether it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature."

So, under EU law, not only the highest, but also the lower courts that meet the criteria mentioned above are allowed to refer to the CJEU in the context of Article 267 TFEU. This partly explains the great impact of the procedure on EU law.[115] By referring to the CJEU, the lower national courts have provided the CJEU with an opportunity to develop EU law and the EU principles, at a relatively early stage of the national judicial procedure.[116] At the same time, only highest national courts and tribunals mentioned in a list provided by a particular state states that has ratified the Protocol, have a right to refer their requests to the ECtHR. Consequently, the list of

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[112] Dr. P.S.R.F. Mathijsen, *A Guide to European Union Law as amended by the Treaty of Lisbon,* 10th Edition, Sweet&Maxwell, Thomson Reuters, 2010, 144. Cited from: Iuliana-Mădălina Larion, "THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES." Challenges of the Knowledge Society 6, no. - (2016-05-01): 421.

[113] Judgment of 16 December 2008 in case C-210/06 Cartesio, paragraphs 54-63; judgment of 6 October 1981 in case 246/80 Broekmeulen/Huisarts Registratie Commissie, paragraphs 8-17; judgment of 17 September 1997 in case C-54/96 Dorsch Consult, paragraphs 22-38. Cited from: Larion, Iuliana-Mădălina. "THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES." Challenges of the Knowledge Society 6, no. - (2016-05-01): 421.

[114] Judgment of 16 February 2017, *Margarit Panicello,* C-503/15, ECLI:EU:C:2017:126, para. 28.

[115] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 642, https://doi.org/10.1177/1023263X1402100404.

[116] *Ibid*.

the courts and tribunals, which may ask for a preliminary ruling from the CJEU, is broader than under the Protocol. Nevertheless, the Recommendations suggest the national courts to make reference "when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case".[117]

On the one hand, this is a drawback of the Protocol since the ECtHR will get involved in the national judicial debates much less frequently and on a later stage as compared to the CJEU. However, firstly, this should prevent the Court from proliferation of the requests. Secondly, the preliminary references constitute 2/3 of all the workload of the CJEU and the biggest number of the requests comes from the lower national courts.[118] Consequently, from this point of view I may presume that the advisory opinion procedure will not cause a significant burden for the work of the Court.

There seems to be one more argument against the Protocol No. 16 in comparison with the preliminary reference procedure. This is that the higher number of the states is potentially involved in the advisory opinions mechanism (there are 28 EU Member States and 47 HCPs to the ECHR). This provides sufficient risk that the requests for the advisory opinions could become a serious adjudicatory burden for the ECtHR. Besides, four out of six HCPs that generate the highest number of the applications to the ECtHR are non-EU Member States. For instance, Russia, Turkey, Ukraine and Serbia are collectively responsible for 48.4% of all the applications submitted to the Court.[119] So, the number of the requests for the advisory opinions could be substantively higher than the number of the requests for the preliminary references.

There are, however, some arguments, which confirm that this will not be the case. First of all, the number of the requests will depend on the number of the HCPs that will ratify the Protocol. Since the Protocol is the optional one, not all the parties to the Convention will ratify it. This is evidenced by the fact that only 12 out of 47 (as of May 3, 2019) members of the Council of Europe have ratified the Protocol since 2013 and out of four states that pose sufficient burden on the ECtHR Ukraine is the only one that have ratified it. Secondly, the Protocol No. 16 does not impose an obligation on the national courts and tribunals to make a request for an advisory opinion; decision to apply for an advisory opinion is a matter of national courts' jurisdiction. Thirdly, the number of the requests will also depend on the decision of the Court to accept the

[117] Courth of Justice of the European Union. "Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings." *Official Journal of the EU* (2016/C 439/01), 2016, para. 19, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016H1125%2801%29.

[118] PRESS RELEASE No 36/18. Court of Justice of the European Union, 23 March 2018. https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180036en.pdf.

[119] European Court of Human Rights, "Analysis of statistics 2011". (2012), 8, https://www.echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf

request since the ECtHR may refuse to provide its opinion.

2.3.3. Subject of the Requests

As is seen from Article 267 TFEU, the competence of the CJEU in the preliminary reference procedure is restricted to interpretation of the treaties establishing the EU. These are primarily the Treaty on the Functioning of the European Union and the Treaty of the European Union. Moreover, this includes also the founding treaties (TEEC, TEEAEC, TEECSC) with all the protocols and declarations annexed to them, the treaties that modified and amended these treaties, as well as the treaties of accession of the new Member States since they also modify the founding treaties. Besides, the CJEU also has jurisdiction to answer the questions on the validity and interpretation of the acts of secondary legislation, e.g., regulations, directives, decisions, etc., regardless of their binding or non-binding nature.[120]

It is interesting enough that the CJEU has answered the questions on infringement of the fundamental rights when there was no explicit reference to this in the Treaties.[121] However, international law provisions and national acts of the Member States of the EU cannot be interpreted or declared invalid by applying Article 267 TFEU. International agreement can become an object of the CJEU's preliminary ruling only if the EU, by means of an act of one of its institutions, is a party to that agreement. International agreements of the Member States of the Union, however, are excluded from ECJ's jurisdiction under Article 267 TFEU. That is, if the Union accedes to the Convention, the CJEU will have a right to interpret and to decide on the validity of the provisions of the Convention and its protocols. For the moment, only the ECtHR has such competence, including when considering of the requests for the advisory opinions.

As for the specific questions that may be subject to the consideration of the court, in the case of the CJEU everything is much clearer since the case law of the CJEU is well developed. For instance, in 2017 there were 533 requests for the preliminary rulings.[122] Consequently, unlike the advisory opinion procedure, it is clear enough which questions can be raised before the CJEU for a preliminary ruling.

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[120] Iuliana-Mădălina Larion, "THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES." Challenges of the Knowledge Society 6, no. - (2016-05-01): 419.

[121] Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* C-11/70, ECLI:EU:C:1970:114, para. 3-4.

[122] PRESS RELEASE No 36/18. Court of Justice of the European Union, 23 March 2018, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180036en.pdf.

There are two criteria which must be satisfied before a reference to the Court of Justice may be made: first, a question should involve EU law; and second, clarification of the CJEU on this question is necessary to enable a national court to give a judgment. With regard to the second criteria, it is a national court that is better placed to assess a stage of the proceeding on which a reference for a preliminary ruling must be addressed. The national court, however, may present a question about interpretation and validity of EU law to the CJEU if it considers the question necessary for its judgment.[123] This requirement narrows the scope of the potential requests more than the Protocol No. 16 does.

From all of the above, it follows that *ratione materiae* of the CJEU in the preliminary reference procedure is broader than jurisdiction of the Court accorded to it by the Protocol No. 16.

It is worth also mentioning that recently the first request for an advisory opinion has been successfully accepted by the Court. The request concerned the margin of appreciation given to the HCPs by Article 8(2) ECHR[124] and "[the refuse] to enter, in the civil register of births, the birth of a child born abroad to a surrogate mother, in so far as the foreign birth certificate designates the child's "intended mother" as its "legal mother", whereas the registration is accepted in so far as it designates the "intended father", who is also the child's biological father […]".[125] Helsinki Foundation for Human Rights, which provided its written comments in accordance with Article 3 of the Protocol No. 16 about the issue raised by the French Court of Cassation in its request, pointed out that this particular question "may have a broader impact on the protection of rights of children born from surrogate mother and their parents. This would be particularly important for countries which do not directly regulate the question of surrogacy."[126] Indeed, surrogacy is expressly prohibited in 14 out of 35 states of the Council of Europe; in 10 of them it is either prohibited by the general provisions or is not tolerated, or a question of its lawfulness is uncertain. In 7 states surrogacy is expressly authorised; and in 4 states it is tolerated.[127] So, I may only presume that the Court decided to accept the mentioned request because the issue of surrogacy is not well regulated across Europe but it is connected to the rights of children – a vulnerable group of people that require higher level of protection. Moreover, it is also connected with the margin of

[123] Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union,* C 115/47 (2008), Article 267, http://data.europa.eu/eli/treaty/tfeu_2012/oj.
[124] Article 8(2) ECHR provides: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[125] European Court of Human Rights. "Grand Chamber Panel accepts first request for an advisory opinion under Protocol 16." Press Release issued by the Registrar of the Court, ECHR 415 (2018).
[126] Marcin Szwed, "Written Comments by Helsinki Foundation for Human Rights: Request for an advisory opinion from the French Court of Cassation no. P16-2018-001." Helsinki Foundation for Human Rights, 31 January 2019, 2, http://www.hfhr.pl/wp-content/uploads/2019/02/Opinia-do-ETPC-w-sprawie-transkrypcji-aktow-urodzenia-dzieci-urodzonych-przez-surogatki.pdf.
[127] *Mennesson v. France, no. 65192/11 ECHR 2014-III (extracts),* para. 78.

appreciation, which, if overstepped by a state, may weaken the protection of human rights and make it ineffective. In any event, it will become more clear what indeed the ECtHR understands under "questions of principle relating to the interpretation or application of the rights and freedoms" only after the case law will be formed.

2.3.4. Possibility of Discretion

The ECtHR was granted discretion to refuse to deal with the requests for the advisory opinions. The CJUE lacks such discretion and has to take on all the preliminary references made. The CJEU, nevertheless, has developed some techniques and constructions, which gives it an opportunity to refuse the irrelevant or hypothetical questions or references lacking a sufficient factual basis. In practice, however, it does not apply them[128]

On the one hand, this discretion provides the Court with a possibility to filter out unimportant matters and focus on the questions related to the important issues, giving guidance only where it thinks it is needed. On the other hand, there is a risk that the Court will abuse this right.[129]

2.3.5. Nature of the Procedures and the Decisions

One more significant difference between the procedures under the CJEU and the ECtHR is a non-binding nature of the latter one. According to Article 267 TFEU, the preliminary reference procedure is mandatory for those courts, which are the highest in the judiciary system of a state, namely those "against whose decisions there is no judicial remedy under national law". All other courts, which are put lower in the hierarchy, however, can request the preliminary rulings from the CJEU upon their own decisions.

In comparison, under the Protocol No. 16, none of the courts and tribunals of the HCPs are obliged to request the advisory opinions. It is worth mentioning, however, that the Member State's court, against whose decisions there is no judicial remedy under national law, could be deprived of its obligation to refer a question to the CJEU on the alleged invalidity of the EU legal act. For instance, in *CILFIT v Ministry of Health* the ECJ held that if a provision of EU law is so clear that leaves no scope for reasonable doubt (*acte clair*), or where the CJEU has already dealt

[128] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 645, https://doi.org/10.1177/1023263X1402100404.
[129] For more see subchapter 2.2.2.

with a specific legal measure in question and held it invalid (*acte éclairé*), the last instance national court or tribunal has discretion to refer a case to the CJEU for a preliminary ruling.[130]

Besides, the CJEU's preliminary rulings are binding for the referring courts but only in those disputes, while considering which the national courts decided to request the preliminary rulings. *Erga omnes* effect of the preliminary rulings, however, was not expressly prescribed in the EU treaties, but appears to be based mainly on its general acceptance by the national courts and the scholars.[131] There is also an opinion that non-compliance with a ruling will constitute a breach of the state's obligations under the Treaty of Accession[132]. Moreover, state liability can also be attributed by the procedural means offered by the European Court of Human Rights. For instance, in *Dhahbi v. Italy*, the ECtHR found that Italy violated Article 6(1) (right to a fair trial) and Article 14 (discrimination) combined with Article 8 (the right to respect for private and family life) of the Convention, since the national courts failed to give the reasons for refusing to make a preliminary reference to the ECJ in order to determine whether the Association Agreement between the EU and Tunisia allowed a Tunisian worker to be deprived of a family support allowance from the Italian authorities and because an applicant was treated differently from the workers who were the EU citizens without objective and reasonable justification.[133]

As for the advisory opinions procedure, despite the advisory opinions will *de facto* have *res interpretata* effect, they will be nevertheless *de jure* legally non-binding for the national courts and non-compliance with either of those opinions will not entail any responsibility on the HCPs.

2.4. Could the aims of the Protocol be Achieved?

While analysing the main provisions of the Protocol No. 16 in the previous Chapter, I expressed some concerns with regard to several of those provisions. These concerns relate to the possibility of the Protocol to become an effective tool for enhancing the dialogue between the ECtHR and the national courts of the HCPs, reinforcing the implementation of the Convention and, as a result, decreasing the number of the cases pending before the Court.

The Protocol No. 16 entered into force on August 1, 2018 and since then there has been

[130] CJEU, Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C-283/81, ECLI:EU:C:1982:335
[131] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 644, https://doi.org/10.1177/1023263X1402100404.
[132] Enlargement Glossary, Treaty of accession - the treaty of accession is signed by the member states and the acceding country once accession negotiations have come to a close. https://ec.europa.eu/neighbourhood-enlargement/policy/glossary_en.
[133] *Dhahbi v. Italy,* no. 17120/09 ECHR 2014, para. 33

only one advisory opinion issued. Consequently, it is not possible to assess unambiguously the impact of the Protocol on the protection of human rights and whether it will be able to achieve the goals set for it. Some authors[134] are sure that the Protocol No. 16 can become an effective instrument for a judicial dialogue between the national courts and the ECtHR and, consequently, will decrease the workload of the Court since the application of the Convention and its protocols on the national level will become more objective. Others[135], on the contrary, believe that the advisory opinion procedure will fail to achieve its goals due to its non-binding nature and the optional nature of the Protocol, and even more, could make a situation of the human rights protection worse since the Court will not be able to deal with the contentious cases properly.

So, in this subchapter, I will establish whether the Protocol is a suitable mean for ensuring practical implementation of the principle of subsidiarity and, as a result, decreasing the number of individual applications pending before the Court.

2.4.1. Establishing Human Rights Protection Standards

The European Court of Human Rights has two functions:

1. Constitutionalist (establishing standards) function, which means that the Court sets and develops the standards for the protection of human rights.

2. Adjudicatory (deciding cases and dealing with inadmissible complaints) function, which stipulates that the ECtHR deals with the inadmissible complaints and takes the decisions mainly in the similar to each other cases. This function preserves the perception of justice by providing a mechanism whereby every breach of the Convention can be addressed.[136]

The idea of the reforms currently taking place in the Convention system is to decrease the Court's overload by strengthening the ECtHR's constitutional role. An intention of the drafters of the Protocol No. 16 was that the Court would be able to clarify the provisions of the Convention through the advisory opinions and, thus, would further enhance the standards of the human rights protection. Some authors,[137] however, argue that the Court does the same while dealing with the contentious cases and since there is no lack of the contentious cases to set the standards, there is

[134] See for example, Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 630-651, https://doi.org/10.1177/1023263X1402100404.
[135] See for example, Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 444-468.
[136] *Ibid*., 458.
[137] See for example, Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 444-468.

no need in a new procedure, the possible results of which are unknown. Dzehtsiarou&O'Meara[138] even believe that the advisory opinion procedure will not enhance the constitutionalist function of the ECtHR but, on the contrary, will make this function more complicated and problematic.

The ECtHR itself, in *Loizidou case,* described the Convention as "a constitutional instrument of European public order".[139] However, after *Loizidou,* this statement was confirmed only a couple of times by the Court. The former president of the Court also described it once as "pretty much as a European Constitutional Court".[140] Later, however, he stated that it is rather a question of semantics whether the ECtHR is a Constitutional Court; nevertheless, it could be, with no doubt, called as a quasi-Constitutional Court, *sui generis*.[141]

In my personal opinion, the arguments mentioned above are not reasonable though. Firstly, it is true that dealing with the contentious cases, the Court performs its constitutional function and sets human rights protection standards. However, the Court is not currently able to consider properly all those individual applications pending before it despite their number is being gradually decreasing. The Protocol No. 16 was adopted in order to decrease the number of the individual applications. Moreover, the very idea of the Protocol No. 16 is to provide the Court with a possibility to give additional comments on the application of the Convention and its protocols. In other words, it was designed specifically for the establishment of human rights protection standards. Consequently, the application of the advisory opinion procedure should lead to further results: 1) the number of the individual applications submitted to the Court will decrease and this will provide the ECtHR with an opportunity to consider them in a more proper way and to ensure the development of human rights protection standards while dealing with the contentious cases;
2) the Court will also have an opportunity to set human rights protection standards in the advisory opinions issued upon the requests of the national courts. So, despite the number of the contentious cases will decrease, the ECtHR will receive the additional opportunity to set human rights protection standards during the contentious cases as well as during the advisory opinion procedure.

Secondly, in the advisory opinion procedure case, human rights protection standards will be set on the earlier stage of justice, namely when the case is under the consideration of a national court. Moreover, the Court is not going to deal with the substances of a particular case during the advisory opinion procedure; it is not going to decide on that case. Instead, the task of the Court is

[138] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 444.
[139] *Loizidou v. Turkey* (preliminary objections) [GC], no. 15318/89, ECHR 1995, para. 75.
[140] Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights." *Human Rights Law Journal* 23, no. 1-5-7 (2002),161
[141] *Ibid*.

to answer particular questions asked by the national courts and thus to provide the guidelines on the application of the Convention and its protocols. So, the procedure of human-rights-protection-standards-setting will be faster during the advisory opinion procedure than during the consideration of the contentious cases.

2.4.2. Enhancing Judicial Dialogue

Another goal of the Protocol is to enhance the dialogue between the ECtHR and the national courts and tribunals. Dzehtsiarou&O'Meara claim that some evidence of the 'constructive' dialogue between highest national courts and the ECtHR already exist.[142] The UK Supreme Court, for example, has recently wondered whether the ECtHR has taken due account of national law in *Horncastle* and *Al Khawaja cases*.[143] Dzehtsiarou&O'Meara called this situation as a "'constructive' deliberative dialogue" between the UK Supreme Court and ECtHR.[144] Amos even stated that this example of a dialogue is the only one among a variety of the 'dialogues' that are apparent to varying degrees between the ECtHR and the national courts. However, he pointed out that the nature of this current dialogue is limited.[145]

Indeed, a certain judicial dialogue already exists. However, it is only the emerging one and, having in mind the benefits, which this judicial partnership can bring, it requires further development. The Court itself found the advisory opinion mechanism as a possible mean of institutionalising the dialogue between the ECtHR and national courts and admitted the value of Protocol for the reinforcement of the role of the national courts in human rights protection.[146] The Court, however, agreed with the position of those authors who think that practical application of Protocol may be followed by some problems.[147]

The Protocol provides several provisions, which, in my opinion, could contribute to the effective realization of this goal. Firstly, only highest national courts have a right to submit their requests for the advisory opinions. This is because a currently existing dialogue exists mainly

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[142] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 444.
[143] *R v Horncastle* [2009] UKSC 14, [2010] 2 All ER 359; *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1. Cited from: Robin White and Iris Boussiakou. "Separate Opinions in the European Court of Human Rights." *Human Rights Law Review 9, no.1 (2009),* 37-38, https://doi.org/10.1093/hrlr/ngn033.
[144] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 455.
[145] M Amos 'The dialogue between the United Kingdom courts and the European Court of Human Rights' (2012) ICLQ 557 at 568. Cited from: Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34 Legal Studies 455
[146] European Court of Human Rights "Reflection paper on the proposal to extend the Court's advisory jurisdiction." 2013, para. 4, https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.
[147] *Ibid*., para. 43.

between the Court and the highest national courts, which, according to the drafters, is indeed "the appropriate level at which the dialogue should take place".[148] The limitation of the list of the courts, which can ask the Court for the advisory opinions, was based on the idea to avoid a proliferation of the requests.[149] In my opinion, however, if not highest, but lower courts received such an opportunity, it would be possible to ensure a better human rights protection even on the earlier stage of justice. This is what was done in the preliminary reference procedure under CJEU and is considered one of the factors, which led to the success of this procedure.[150] When only 'highest courts and tribunals' possess an opportunity to refer to the Court with the requests for the advisory opinions, the Court intervenes into legal debate later (sometimes even only in several years after an initial lawsuit to a domestic court). This means that probably only few questions will be raised before the Court and that it will be able to give its guidance less frequently. Consequently, the aim of enhancing effective interaction is not likely to be achieved.

Secondly, Article 1(3) of the Protocol requires the national courts and tribunals "to give reasons for [their requests for the advisory opinions and to] provide the relevant legal and factual background of the pending case". They are advised that "[i]f possible and appropriate, a statement of [the requesting court's] own views on the question, including any analysis it may itself have made of the question" should be provided to the ECtHR when requesting an advisory opinion.[151] In other words, a national court presents its own position on the issue and the ECtHR could take it into account while delivering its advisory opinion. In my opinion, this provision is the best way of fostering the dialogue between the Court and the national courts and tribunals. Moreover, if the Court has more information on a case and knows the position of the national court, it is more likely that it would issue the most volumetric and objective advisory opinion that would fully addresses the concerns of the requesting court and, as a result, that advisory opinion would be followed by the national court and the goal of the Protocol would be better achieved.

Thirdly, Article 4(1) of the Protocol also requires the Court to give the reasons for the advisory opinions delivered by it. Moreover, Article 4(2) allows the judges of the Grand Chamber to deliver their separate opinions in the advisory opinion procedure. All these, in my opinion,

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[148] Committee on Legal Affairs and Human Rights, "Explanatory Memorandum to Protocol No. 16." Doc. 13220 (2013), para. 8, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19771&Language=EN; ECtHR, European Court of Human Rights "Reflection paper on the proposal to extend the Court's advisory jurisdiction." 2013, para. 26, https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.

[149] European Court of Human Rights "Reflection paper on the proposal to extend the Court's advisory jurisdiction." 2013, para. 26, https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.

[150] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 645, https://doi.org/10.1177/1023263X1402100404.

[151] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 12(e), https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

should ensure the validity of the opinion and provide the national courts with more detailed guidelines on the implementation of the Convention and its protocols. Consequently, this will ensure the enhancement of the dialogue between the Court and the national courts and tribunals.

Some may, however, argue that a big number of the dissent opinions may undermine the authoritative value and legitimacy of the advisory opinions. I would like, however, to disagree. Letsas, for example, draws a parallel with the judges' separate opinions in common law countries asserting that they play a key role in shaping the character of judicial reasoning and in contributing to the legitimacy of the judiciary. He states that a judge who disagrees with other judges would not, *ipso facto*, undermine legitimacy of the outcome. However, his disagreement should be based on the reasons that point to substantive principles capable of justifying not only the resolution of a dispute but also the setting of a precedent.[152] Since the task of the advisory opinion procedure is not to solve a case in the Court, but to provide the national courts and tribunals with the additional guidelines on how to ensure better compliance of their decisions with the Convention and its protocols, the abovementioned statement would be even more relevant for the Protocol.

I would like also to draw a parallel with the dissent opinions given by the judges in the contentious cases. For instance, judges of the Court themselves consider the dissenting opinions delivered by them in the contentious cases as "demonstrating the nuances of human rights protection and promoting debate among the Strasbourg judiciary, indicating that questions of interpretation and application were not always clear-cut, and demonstrating openness and transparency".[153] Even more, the dissent opinions of the Court often have been the impetus for subsequent development of case law of the ECtHR and have served to improve the quality of the Court's reasoning.[154]

So, the dissent opinions of the Court's judges should not undermine, but, on the contrary, enhance the legitimacy of the advisory opinions as they do with the judgments delivered in the contentious cases.

Provision that causes the biggest number of questions with regard to the possibility of the Protocol No. 16 to become an effective tool for the human rights protection is a non-binding nature of the Protocol. As I have mention in the previous Chapter, non-binding nature of the

[152] George Letsas,. "Judge Rozakis's Separate Opinions and the Strasbourg Dilemma." in *The European Convention on Human Rights: A Living and Dynamic Instrument - Liber Amicorum in Honour of Judge Rozakis,* Spielmann, Dean, Marialena Tsirli and Panayotis Voyatzis. (Brussels: Bruylant, 2011).

[153] Robin White and Iris Boussiakou*, "Separate Opinions in the European Court of Human Rights." Human Rights Law Review 9, no.1 (2009), 57,* https://doi.org/10.1093/hrlr/ngn033.

[154] George Letsas, "Judge Rozakis's Separate Opinions and the Strasbourg Dilemma." in *The European Convention on Human Rights: A Living and Dynamic Instrument - Liber Amicorum in Honour of Judge Rozakis,* Spielmann, Dean, Marialena Tsirli and Panayotis Voyatzis. (Brussels: Bruylant, 2011).

Protocol has three dimensions. In this Chapter I would like to pay attention to the third one – "the courts are not bound by the advisory opinions issued by the Court".[155] This provision means that neither the referring courts, nor any other courts are bound by the advisory opinions issued by the ECtHR. This provision carries both the benefits and the risks for the reinforcement of the dialogue between the national courts and tribunals and the ECtHR. The main question in this regard is whether a referring court will follow an advisory opinion issued upon its request and, as I have mentioned in the previous subchapter, the advisory opinions issued by the ECtHR according to the Protocol No. 16 will have *res interpretata* effect. This means that, *de facto*, the Court's interpretations can be considered to be binding on the states since the states are obliged to comply with the Convention as is explained by the Court.[156] Even more, some authors[157] emphasise that due to their nature, advisory opinions will strengthen the *erga omnes* effectiveness of the Court's case law.[158] But in any case, it is a domestic court that decides whether to follow an advisory opinion issued upon its request or not and no responsibility will be imposed on it in case of not following the Court's guidance. Nevertheless, the Guidelines on the Implementation, requires the referring court "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".[159]

Another provision, which causes some concerns, is that the Court may reject to give the advisory opinions upon the request on the national courts[160] and the Protocol is silent on what could be the reasons for such a rejection. Explanatory Report, however, provides that there are no grounds for the Court "[…] to refuse a request if it satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1".[161] Herewith, the panel must give the reasons for any refusal to accept a domestic court's request for an advisory

[155] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 5, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.
[156] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 635, https://doi.org/10.1177/1023263X1402100404.
[157] See, for example, Ada Paprocka and Michał Ziółkowski, "Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights." *European Constitutional Law Review* 11, no. 2 (2015): 274–292, https://doi.org/10.1017/S1574019615000176.
[158] Linos-Alexandre Sicilianos, 'L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole no 16 à la Convention européenne des droits de l'homme.' *Revue trimestrielle des droits de l'homme* (2014) No. 97, 26. Cited from: Ada Paprocka and Michał Ziółkowski, "Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights." *European Constitutional Law Review* 11, no. 2 (2015): 292. https://doi.org/10.1017/S1574019615000176.
[159] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 31, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.
[160] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 2, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.
[161] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series* No. 214 (2013), para. 14, https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

opinion. The reasons for the refusal of a request shall be made public.[162] It is assumed that by providing the national courts with the reasons of the refusal, the Court will clarify what are the 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto' and, thus, will provide the guidance to the national courts and tribunals when considering whether to make a request and thereby help to prevent inappropriate requests. So, this provision intends to reinforce the dialogue between the ECtHR and national judicial systems.

Nevertheless, it is likely that the reasons provided by the ECtHR would be rather formal and general in nature and would not mention any substantive or 'political' grounds underlying a refusal in order not to become involved not to become involved in the delicate national debates or a sensitive constitutional matters. This could be done in order to avoid further dissatisfaction of the HCPs with the Court's work, having in mind that in the last years it is often criticized for being political, and as "too strongly involved with national choices and national constitutional values"[163]. This risk is particularly high having in mind that the Court itself has already indicated that it "envisages that such reasons will normally be not extensive".[164] On the one hand, this could mislead the HCPs with regard to the questions, which could be referred to the Court. On the other hand, there is also a risk that the national courts will try to use the advisory opinion procedure in order to avoid decisions on politically sensitive cases to be taken by them. They could then put responsibility for obliging them to take a debatable or activist decision on the ECtHR.[165] As a result, the authority and legitimacy of the ECtHR may suffer. The Court could avoid getting involved in such issues by refusing the requests relating to clearly political issues. However, this could undermine the Protocol's aim of enhancing interaction on important matters of interpretation.

Besides, in the previous part of the thesis, among the main provisions of the Protocol I have mentioned the provisions relating to the national authorities, which may request an advisory opinion. The main point with regard to the effectiveness of the Protocol that is in doubt is that a list of the courts and tribunals, which have such a right, should be provided by each HCP that has

[162] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 2(1), https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.
[163] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 647, https://doi.org/10.1177/1023263X1402100404.
[164] European Court of Human Rights. "Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention." 6 May 2013, para. 9, https://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.
[165] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 647, https://doi.org/10.1177/1023263X1402100404.

ratified the Protocol No. 16. Moreover, the list of courts and tribunals may be changed by a HCP at any time after the ratification of the Protocol. On the one hand, placing responsibility for selecting the competent courts on the High Contracting Parties reinforces their roles as primary defenders of human rights. On the other hand, however, affording them this degree of discretion could result in abuse of that right. For instance, the nomination of the responsible courts and tribunals could be influenced by political motivations. So, much will depend on the preparedness of the HCPs to nominate highest courts in a consistent manner, free from political motivations manner.

2.4.3. Decreasing the Court's Overload

Another goal, long-term, though, of the reforms currently taking place in the Convention system is to decrease the Court's overload. The Group of Wise Persons found the advisory opinion mechanism as a suitable mean for achieving this goal.[166] The idea is that the Court will clarify the meaning of the Convention and its protocols and the national courts will be able to apply the relevant standards and criteria in their own case law more easily and at a relatively early stage of the trial. This should result in a lower number of the individual applications filed to the Court since the majority of them will be satisfactorily solved at the national level. Indeed, at first sight, it seems that the workload of the Court will not increase significantly since the Protocol itself has a number of provisions that should prevent this, e.g., not all the courts can apply for the advisory opinions, but only highest courts and tribunals; the ability of the Court to refuse to accept the requests; etc.

There are, however, some provisions, which cause some big concerns with regard to the possibility of the Protocol to decrease the Court's workload, even in a long-term perspective. For instance, the very idea of a judicial dialogue between the national courts and the ECtHR is based on the presumption of a positive attitude of the national courts towards the ECtHR. This is indicated also by the optional nature of the Protocol and non-binding nature of the advisory opinions. So, an advisory opinion will be requested and implemented by a national court only if it agrees with the image of partnership and if it wills to ask the Court for guidance. Moreover, the advisory opinion procedure will prove itself as a proper tool for enhancing the human rights protection only if the legislature and administrative authorities abide by the judgments of the

[166] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, Council of Europe, 15 November 2006, para. 81, https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM.

national courts.[167] However, the HCPs are rather critical with respect to the Court nowadays.[168] Moreover, the influence of the national courts on the legislature and the government is relatively limited and the ECHR interpretations by the national courts are being implemented into national legislation and policy extremely rare.[169] It can be even expected that the HCPs where the Court's work is met with scepticism will not even ratify the Protocol. Consequently, it is highly unlikely that the interaction between the national courts and the ECHR will be effective if based on the advisory opinion procedure and, thus, the aim of decreasing the Court's caseload will not be achieved.

Besides, in Dzehtsiarou&O'Meara's opinion in order to speed up the Court's procedure, there is a need to simplify the adjudicatory function of the Court.[170] The Protocol No. 16, however, is aimed on the opposite – strengthening of the constitutional role of the Court. Indeed, according to the Court's analysis of statistics in 2012, 65 200 applications were allocated to a judicial formation, while 81 700 of applications were declared inadmissible. Only a small number of those applications were related to the cases where the provisions of the Convention were not clear. Instead, the majority of the applications stem from the structural defects in the national legal systems, e.g., the excessive length of national proceedings, the refusal to give effect to national judgments or the fairness of the proceedings[171], and were either found inadmissible or concerned straightforward violations.[172] As was mentioned above, the Court decides on the cases while realizing its adjudicatory function, but not constitutional one. So, from this point of view it seems that the Protocol will have no positive effect on the Court's workload. Instead, it could even increase it. Pursuant to the Protocol, the Grand Chamber of the ECtHR will be responsible for delivering the advisory opinions[173] and, as of 28 February 2019, 22 300 individual applications have been already allocated to the Grand Chamber together with the Chamber.[174] Definitely, if the Grand Chamber has to deal also with the requests for the advisory opinions, this will put

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[167] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 646, https://doi.org/10.1177/1023263X1402100404.

[168] For more see, for example, Popelier, Patricia, Sarah Lambrecht, and Koen Lemmens, eds. *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level*. Intersentia, 2016. doi:10.1017/9781780685175.

[169] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal." *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014), 646, https://doi.org/10.1177/1023263X1402100404.

[170] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 459.

[171] European Court of Human Rights, "The European Court of Human Rights in Facts and Figures 2018." (2019), 7, 10, 11, https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf

[172] Council of Europe, "Annual Report 2012 of the European Court of Human Rights." (2013), 154, https://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf.

[173] According to Art 2(2) of Protocol 16 the Grand Chamber shall deliver the advisory opinion. According to current text of Art 31(c) of the Convention, the Grand Chamber shall consider requests for advisory opinions.

[174] European Court of Human Rights, "EUROPEAN COURT OF HUMAN RIGHTS STATISTICS 1/1-31/3/2019 (compared to the same period 2018)." Accessed 2019 May 6. https://www.echr.coe.int/Documents/Stats_month_2019_ENG.pdf.

additional burden on it.

Moreover, the advisory opinion procedure is long enough. First of all, the panel of 5 judges should decide on whether a request for an advisory opinion should be accepted. During this process, the panel examines, firstly, 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 thereto and, secondly, whether it meets the procedural requirements established in Article 1 § 3 of the Protocol and outlined in Rule 92 § 2.1 of Chapter X of the Rules of Court regarding its form and content. After that, the Court should issue its opinion. This will also require some time.

Some may argue, however, that since the advisory opinion procedure is not adversarial one, it will be less time and resource consuming. Nevertheless, only if the advisory opinions are perceived as legitimate, the effective standards of the human rights protection could be established and will be perceived as the authoritative ones.[175] If the parties have no input in the advisory opinion proceedings, the legitimacy of the process will arguably be reduced. Consequently, the ECtHR will have to enhance the legitimacy of its advisory opinions by ensuring procedural participation of the parties, which will lead to lengthy proceedings. The Protocol No. 16 tried to ensure the legitimacy of the advisory opinions by providing the Council of Europe Commissioner for Human Rights, High Contracting Party, whose domestic court or tribunal has requested the advisory opinion with a right to submit written comments to and take part in any hearing before the Grand Chamber in the proceedings concerning that request. Moreover, the President of the Court may invite any other High Contracting Party or person to submit written comments or take part in any hearing.[176]

On the one hand, a possibility for parties and other persons to provide their comments in the advisory opinion procedure is a factor that not only ensures the legitimacy of the advisory opinions, but is also a direct manifestation of the dialogue between the national courts and the Strasbourg. In the Court's own opinion, the possibility to engage the Commissioner for Human Rights, the HCPs and any other persons to the process of the adoption of the advisory opinions ensures the realization of the principle of equality.[177] On the other hand, nevertheless, this will make the advisory opinion procedure lengthier. For example, the first request for an advisory

[175] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 460.
[176] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS 214 (2013), Article 3, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.
[177] European Court of Human Rights. "Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention." 6 May 2013, para. 10, https://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.

opinion was submitted on 23rd October 2018. After that, the Court announced the possibility of written observations, which had to be finished on 31th January 2019. And some persons, e.g., French Government, Helsinki Foundation for Human Rights, ADF International, etc. did use this right. The advisory opinion under this request was delivered almost 6 months later after the request was submitted, on April 10, 2019.

At the beginning of the Court's functioning the procedure of the contentions cases was not adversarial as well. However, the situation has changed later. The same may happen also to the advisory opinion procedure. In addition, over time, the ECtHR may allow the parties to submit their notes on the issue almost automatically. In this situation, the borderline between the adversarial procedure in the contentious cases and the advisory opinion procedure will become blurred.[178]

According to the Guidelines on the Implementation, requesting court or tribunal can decide to suspend the domestic proceedings pending the delivery of a Court's advisory opinion.[179] Again, this what the French Court of Cassation did.[180] But will not this cause a longer trials by the national courts? The Court stated that in order to avoid this, there is a need for the advisory procedure to be completed within a reasonably short time and, therefore, a degree of priority should be given for it.[181] The same is underlined in paragraph 17 of the Explanatory Report. But if the Court provides a request for an advisory opinion with a priority, will not this cause the delay in the work of the Grand Chamber? Increasing delays in the national trial could demotivate the national courts to be involved in the advisory opinions mechanism and could have an impact on the capacity of the Grand Chamber to adjudicate its contentious caseload. This, in turn, could lead to the weakening of the dialogue between the national courts and the ECtHR.

Moreover*, raison d'etre* of the ECtHR is that "it will hear any case, from anyone who claims to be a victim of the Convention."[182] Of course, this does not mean that the Court will have to examine all the applications; some of them will be rejected since they do not correspond to the admissibility criteria. Nevertheless, despite a huge number of the applications found inadmissible,

[178] Kanstantsin Dzehtsiarou and Noreen O'Meara. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34, no. 3 (2014): 461.
[179] European Court of Human Rights, "Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017)", para. 21, https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.
[180] *European Court of Human Rights. "The French Court of Cassation has submitted to the European Court of Human Rights the first request under Protocol No. 16, seeking an advisory opinion on the question of surrogacyPress." Press Release issued by the Registrar of the Court, ECHR 352 (2018).*
[181] European Court of Human Rights. "Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention." 6 May 2013, para. 13, https://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.
[182] M-B Dembour, "Finishing off' cases: the radical solution to the problem of the expand- ing ECtHR caseload' (2002) 5 EHRLR 604 at 621. Cited from: Kanstantsin and O'Meara, *Advisory jurisdiction and the European Court of Human Rights*

the mission of the Convention is in any case "indissoluble from the right of individual petition […] [and] individual justice".[183] Basing on this, the Protocol prescribes that the existence of an advisory opinion does not prevent a party to the case from exercising its right on individual petition.[184] If this is true, there is a risk that the Court will have to deliver its advisory opinion and after that to deal with an individual application on the same issue. This, obviously, will put additional burden on the Court instead of facilitating its work. However, if this individual application concerns exactly the issue, which the Court dealt with in the advisory opinion, then the ECtHR, believing that this application had been sufficiently assessed by a national court basing on that advisory opinion, will find it inadmissible.[185]

To sum up, it is difficult to predict whether the additional burden for the Grand Chamber, such as the advisory opinion procedure, will stand in a proportionate relation to the advantages of this procedure in terms of additional clarity it may provide for the national courts and the reduction the number of the individual applications brought before the Court as a result of that additional clarity. But returning to the statistics that such a big number of the applications submitted to the Court do not result from the lack of the clarity of the Convention provisions, but rather from the systemic problems in the national legal systems or national policy, it is doubtful that this long-term goal will be achieved.

2.5. Opinion 2/13 of the Court of Justice of the European Union

For a long period of time there has been an opinion that the EU should accede to the European Convention on Human Right. Supporters of such an opinion believe that the accession will influence the protection of human rights in the EU in several ways. First of all, it could be seen as the personification of the EU's concerns about human rights since the ECHR is seen as a part of the cultural and political heritage of the European Union.[186] Secondly, the Union's accession to the Convention will eliminate the criticism of the EU's double standards, namely that the EU requires the accession of all the MSs (as the members of the Council of Europe), but has

[183] Paul Mahoney, "Thinking a small unthinkable: repatriating reparation from the European Court of Human Rights to the national legal order" in L Caflisch et al (eds) Liber amicoruin Luzius Wildhaber: Human Rights - Strasbourg Views (Kehl: Engel, 2007), 267. Cited from: Kanstantsin and O'Meara, *Advisory jurisdiction and the European Court of Human Rights*, 459.
[184] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series* No. 214 (2013), para. 26, https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.
[185] *Ibid*.
[186] Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", Verfassungsblog on mattares constitutional (blog). December 12, 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

not acceded to the ECHR itself yet. Finally, the accession will provide the EU citizens with a possibility to protect their rights when they are violated by the Union as a whole. For now, they do not have such a possibility and this can be considered as a gap in judicial enforcement since violated rights remain unprotected. For instance, the ECtHR in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v Netherlands* (2009) noted:

> The European Community has separate legal personality as an international intergovernmental organisation […]. At present, the European Community is not a party to the Convention […]. The application is therefore incompatible with the provisions of the Convention ratione personae within the meaning of Article 35 § 3 of the Convention in so far as the applicant association's complaints must be understood as directed against the European Community itself […] and must be rejected pursuant to Article 35 § 4.[187]

However, the Court of Justice of the European Union has expressed its negative position on this issue for already several times. For instance, in 1996 it issued Opinion 2/94[188], in which it concluded that the European Community could accede to the ECHR only after the Maastricht Treaty would be changed. As a result, in 2007 the Treaty of Lisbon, which amended the Maastricht Treaty, was signed. Namely, it added Article 6(2) that requires the EU to accede to the Convention. Moreover, the Protocol No. 8 that regulates the details of the accession and Declaration that requires the accession to comply with "[…] the specific characteristics of the Union and Union law […]"[189] were added. In order to ensure fulfilment of this obligation, the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human rights and Fundamental Freedoms (hereinafter the DAA, the Draft Agreement) was drafted in 2013. The DAA prescribes how the EU and EU law could be integrated into the Convention system. The intention of the parties to this agreement was to give the ECtHR jurisdiction to consider applications against the EU in order to close a gap in judicial enforcement of human rights.[190]

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[187] *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009-I, para. 2.
[188] Opinion 2/94 of the Court, 28 March 1996, ECLI:EU:C:1996:140, para. 35, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99549&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6077612.
[189] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. *Official Journal of the European Union,* C326/1 (2012), Article 1, http://data.europa.eu/eli/treaty/tfeu_2012/pro_8/oj.
[190] Aidan O'Neill, *"Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty."* Eutopia Law, 18 December 2014, https://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/

According to Article 218(11) TFEU[191], the ECJ was asked to provide its opinion on whether the DAA was compatible with the founding treaties of the European Union. On December 18, 2014, the CJEU issued Opinion 2/13, which is significant for several reasons. Firstly, the CJEU for the first time explicitly stated that the EU is not a state[192] and that EU system is *sui generis*[193]. Secondly, the CJEU also asserted that it was important to ensure the primacy and direct effect of EU law, referring also to the EU's goals of "[…] creating an ever closer union among the peoples of Europe."[194] Thirdly, the ECJ concluded that the Draft Accession Agreement of the EU to the Convention is not compatible with EU law.[195] Forthly, and the most importantly in the context of this Master Thesis, despite the Draft Agreement contains no provisions on the Protocol or the advisory opinion procedure, the ECJ nevertheless drew its attention to the Protocol No.16 concluding that it may affect the autonomy and effectiveness of the preliminary reference procedure under the CJEU.[196]

Since the issue of the EU's accession to the Convention is not a topic of this Master Thesis, I am not going to analyse whole Opinion 2/13. Instead, I will focus on the CJEU's position with regard to the Protocol No.16 only and will try to figure out whether the Protocol No.16 could indeed undermine the autonomy of EU law and whether this autonomy could be prioritized compared to the protection of human rights. The analysis of this document seems to be important since Opinion 2/13 of the CJEU may have an influence on the desire of the EU MSs not to ratify the Protocol, which, as the drafters believe, could become an effective tool for enhancing the human rights protection.

The CJEU justification of its position is based, among others, on further arguments. In the Protocol No. 8 to Lisbon treaty it is stated that "[the accession agreement] shall make provision for preserving the specific characteristics of the Union and Union law"[197], which are: the principle of conferral of powers; the institutional structure set up by Articles 13 to 19 TEU; EU law is an independent source of law, characterized by its primacy and direct effect.[198] It is, therefore, unacceptable that the ECtHR will examine the ECJ's findings in relation to the scope of EU law.

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[191] Article 218 (11) TFEU prescribes: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."
[192] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 156, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.
[193] *Ibid*., para 158.
[194] *Ibid*., para 166-67.
[195] *Ibid.*
[196] *Ibid*., para. 197.
[197] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. *Official Journal of the European Union,* C326/1 (2012), Article 1, http://data.europa.eu/eli/treaty/tfeu_2012/pro_8/oj.
[198] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454, para. 164-177, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.

However, after the accession to the ECHR, the interpretation of the Convention given by the Cpurt will bind the EU and all its institutions, including the ECJ.

The CJEU specified 3 cases when exactly the DAA encroaches on the autonomy of EU law. Among them is the advisory opinion procedure[199] since the national highest courts of the EU MSs might prefer to request an advisory opinion from the Strasbourg on the compatibility of EU law with ECHR rights, rather than ask the CJEU for a preliminary ruling. The CJEU stated: "Since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary reference procedure provided for in Article 267 TFEU", adding that "it cannot be ruled out that a request for an advisory opinion made pursuant to the Protocol No. 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary reference procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties".[200]

Consequently, it concluded that there is a need to make a provision in the DAA in respect of the relationship between the mechanism established by the Protocol No. 16 and the preliminary reference procedure.[201]

Indeed, according to Article 216(2) TFEU the Convention's provisions, when ratified, will become an integral part of EU law and, thus, will be binding for the EU, its institutions and its Member States. Consequently, an issue of interpretation of the ECHR will become a matter of interpretation of EU law and, according to EU law, should be the CJEU's responsibility. However, the MSs that ratify the Protocol No. 16 may prefer to refer to the ECtHR as the members of the Council of Europe when, in fact, they should be asking the CJEU the same question involving the Convention as a part of EU law.

Given the fact that Article 267(3) TFEU put an obligation on "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law"[202] to refer to the CJEU, some may argue that the situation underlined above will not happen. However, it is not quite like that since Article 267(3) TFEU says about "the highest courts and tribunals". These are the courts and tribunals put on the top of the whole judicial hierarchy of a state. The Protocol,

[199] *Ibid*., para. 196.
[200] *Ibid*., para. 197-198.
[201] *Ibid*., para. 199.
[202] Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union,* C 115/47 (2008), Article 267(3), http://data.europa.eu/eli/treaty/tfeu_2012/oj.

in its turn, is applicable to "highest courts and tribunals", so to the courts which are the highest only for a particular types of the cases. But, of course, these could also be the courts put on the top of the judicial hierarchy since it is up to the HCPs to provide a list of the courts and tribunals that will have a right to refer to the ECtHR with the requests for the advisory opinions. It is, however, slightly likely that the HCPs will put the highest courts and tribunals in that list since the opposite situation will give them an opportunity to use that 'forum shopping', which the CJEU was talking about, in order to choose the most 'appropriate' court for a particular case.

So, since the Union has an obligation to accede to the Convention, sooner or later this will happen and the effectiveness of Article 267 TFEU could be put under the treat. Nevertheless, even if the EU indefinitely postpones the accession to the Convention, the preliminary reference procedure could be indirectly affected by the Protocol. This is what is also happening now. For instance, the Convention is not ratified by the Union and, thus, it does not constitute a part of EU law and its interpretation regarding the rights corresponding to those guaranteed by the Charter remains a matter related to the Convention. This means that not the CJEU, but the Court keeps having responsibility for the interpretation of its provisions and the EU MSs, which have ratified the Protocol as the members of the Council of Europe, have a right to file their requests for the advisory opinions to the Court also on the matters that corresponds to the Charter. Besides, according to Article 6(3) TEU the fundamental rights of the ECHR should be considered as the general principles of Union law. This means that even in the current situation, the ECJ has a right to interpret the provisions of the Convention, namely those that correspond to the provisions of the Charter. So, even in the cases of 'non-accession' the autonomy of EU law could be indirectly affected by the Protocol.

As it was mentioned in subchapter 2.3., the preliminary reference procedure proved itself as a proper instrument for the unification of EU law. Weiler even said: "It represents one of the cornerstones of ensuring the effectiveness and supranational quality of EU law".[203] Both situations underlined above (before the EU's accession to the Convention and after that) indeed contradict with Article 267 TFEU and, thus, undermine the autonomy of the preliminary reference procedure, the CJEU and EU law as a whole. So, from the perspective of EU law autonomy, the position of the CJEU expressed in the Opinion 2/13 with regard to the Protocol is well justified. In this context it is worth, however, mentioning that the Union is based on a set of common values, among which there is also the protection of human rights and respect of this value is a condition

[203] Joseph Weiler, The Transformation of Europe, 100 Yale L.J. 2403 (1991). Cited from: Krenn, Christoph. "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13." *German Law Journal* 16, no. 01 (2015), 147.

for the accession to the Union, while its disrespect can lead to suspension of the membership in the EU in serious cases. Moreover, Article 67(1) TFEU prescribes: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights […]". As seen from the arguments and proposals of the ECJ, however, it worries only about its own role of the 'monopolist' in the interpretation of Union law, rather than about the human rights protection.[204] Its justification is based on generic concerns about the relationship between EU law and international law and between the CJEU and other international courts and tribunals.[205] Peers even characterizes the CJEU's Opinion 2/13 as "a clear and present danger to human rights protection".[206] Leonard Besselink stresses out that the ECJ President's announcement at the FIDE Conference in 2014 – "The Court is not a human rights court: it is the Supreme Court of the Union" – should be taken seriously now.[207]

For sure, the autonomy of EU law should be safeguarded. However, struggle for EU law autonomy should not threaten the fundamental rights and overturn the values of the EU. Even more, the autonomy of EU law requires that the interpretation of those fundamental rights should be ensured within the framework and structure of the Union.[208] So, taking care of the autonomy of its law, the EU should not forget about taking care of the human rights first. This, in its turn, will ensure even better protection of its autonomy. However, if the EU accedes to the ECHR on the conditions proposed by the CJEU in Opinion 2/13, including the one about the insertion of a provision that will settle the relationship between the Protocol No. 16 and Article 267 TFEU, '[…] human rights protection in the EU would not be enhanced, for the EU would be shielded from many human rights claims […]'.[209] Nevertheless, it is unlikely that this will happen. Any changes to the Accession Agreement proposed by the CJEU should be negotiated by all 47 HCPs and it is highly unlikely that the non-EU members of the Council of Europe will uphold the amendments that insist on either the primacy of the EU courts over the ECtHR, or give priority to EU law over

[204] Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", Verfassungsblog on mattares constitutional (blog). December 12, 2014. https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/;

[205] Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges,* Hart Publishing 2014. Cited from: Schill, Stephan W., *"Editorial: Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment Agreements."* (Journal of World Investment & Trade, 16 (2015)), 379.

[206] Steve Peers, "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection." (2014). Cited from: Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", Verfassungsblog on mattares constitutional (blog). December 12, 2014. https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

[207] Leonard Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13." Verfassungsblog on mattares constitutional (blog). December 23, 2014. https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/

[208] "Editorial comments: The EU's Accession to the ECHR – a 'NO' from the ECJ!." *Common Market Law Review* 52, no. 1 (2015), 7, http://media.leidenuniv.nl/legacy/editorial-comments--february-2015.pdf.

[209] Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", Verfassungsblog on mattares constitutional (blog). December 12, 2014. https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

the Convention, but are not aimed at ensuring more effective human rights protection in accordance with the Convention. So, either the EU will disregard Opinion 2/13 and will accede to the Convention on the basis of the current DAA, or the question of the EU's accession to the Convention will remain unresolved indefinitely. It seems, however, that the Protocol No. 16 in any case will indeed have an impact on the 'monopoly' of the CJEU to deal with EU law issues and, thus, could influence 'the specific characteristics of the Union'. However, if we put the human rights first, as it should be done, then the arguments of the CJEU seem to be irrelevant and "[consider only] minor and immaterial threats to the autonomy and effectiveness of EU law as adversely affecting the constitutional basis of the Union".[210] There seems to be only CJUE's concern for its own position in the European legal order behind its argumentation, rather than for enhancing the human rights protection in the Union.

2.6. Summary

As for now, it is impossible to state unequivocally whether the Protocol will be an effective tool for decreasing the number of the cases pending before the Court. Theoretically, the Protocol has both the provisions that will ensure achievement of this aim and those that will prevent it from doing this. The Protocol will, however, enhance the judicial dialogue between the ECtHR and the national courts of the High Contracting Parties to the Convention and will ensure establishing human rights protection standards. It is also clear enough that the main concern – that the advisory opinions will not be bind for the states – is groundless since the advisory opinions will have *res interpretata* effect and thus, will, *de facto*, bind the HCPs and will influence judicial decision-making in the Court and at the national level despite no responsibility for their non-implementation could be imposed.

The Protocol No. 16, however, does not take into consideration a special status of the Constitutional Courts and, thus, may prevent them from performing a function of constitutional control effectively. Moreover, the advisory opinion procedure could interfere into the relationship between the Constitutional Courts and the High Ordinary Courts.

[210] Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13." *German Law Journal* 16, no. 01 (2015), 147, http://www.mpil.de/files/pdf4/Krenn_A_Path_to_ECHR_Accession_After_the_ECJs_Opinion.pdf.

What is clear enough, is that, despite all the similarities, it does not seem possible to claim that the Protocol will have the same success as the application of Article 267 TFEU has since these two procedures have different purposes and their very essence is different. Besides, the nature of the procedures and the decisions taken in the result of their application is, *de jure*, different. However, both of them are based on the idea of enhancement the dialogue with the national courts.

The CJEU in Opinion 2/13 also reasonably stated that the Protocol would undermine the efficiency of the preliminary reference procedure under the CJEU and, thus, the autonomy of EU law as a whole. Moreover, it will put a position of the CJEU in the EU legal order under a question. However, neither the autonomy of EU law, nor the position of the CJEU could be put higher than the necessity to ensure human rights protection.

CONCLUSIONS

1. The aim of the Protocol No. 16 is to ensure practical application of the principle of subsidiarity by enhancing judicial dialogue between the ECtHR and the national courts and tribunals and establishing higher human rights protection standards and thus, to decrease the Court's workload.
2. The idea of the advisory opinion procedure is to provide the national courts and tribunals with the guidelines on the implementation of the Convention and its protocols. This should ensure that the decisions taken by the national courts and tribunals are objective and taken in full accordance with the Convention and its protocols and hence, the individuals will not have necessity to refer to the Court with the individual applications according to Article 34 ECHR.
3. As a result of the research, it became clear that it is not possible to confidently answer the question whether the Protocol will influence the protection of human rights in the Union positively. It will for sure enhance the judicial dialogue between the national courts and the ECtHR and ensure establishing of human rights protection standards. There is, however, some doubts that the Protocol will help to reduce the Court's workload. For instance, in order to decrease the Court's workload, there is a need to strengthen the adjudicatory function of the Court since the majority of the applications stems from the structural defects in the national legal systems. The Protocol No. 16, however, is aimed on the strengthening of the constitutional role of the ECtHR. Besides, the advisory opinion procedure could put an additional burden on the Grand Chamber which is responsible first, for delivering its advisory opinions upon the requests of the national court and tribunals; second, for considering the individual applications submitted for its consideration under Article 34 ECHR.
4. The are also other issues which causes some concerns. For instance, the Protocol does not provide the strict criteria basing on which the Court may reject to accept a request for an advisory opinion. In order to avoid any 'political' ground, the Court may mention rather 'formal' and general in nature grounds. This can mislead the national courts about the real criteria. Moreover, there is a risk that the High Contracting Parties will use the advisory opinion procedure in order to avoid the decisions on political issues.

5. Moreover, the stages of consideration of a request are not clearly delineated in the Protocol and the advisory opinion procedure is long enough. Moreover, a national court may decide to suspend the consideration of the claim in connection of which it referred to the Court.
6. The main concern of some authors is connected with the non-binding nature of the advisory opinions. However, the research has shown that the advisory opinions will have *res interpretata* effect and thus, will form a part of the Convention and *de facto* will be binding for the national courts that will refer to the Court, for all other courts and for the Court itself. However, no liability can be put on a court that will not follow an advisory opinion since the HCPs are obliged to comply with the provisions of the Convention and its Protocols.
7. The Protocol does not take special status of the Constitutional Courts into account and does not provide them with the special treatment in case they are provided with a right to ask for the advisory opinions. Moreover, there is a risk that the Protocol will negatively influence the relationship between the CC and the Highest Ordinary Courts. By providing the HOCs with a possibility to refer the question of constitutionality of a particular norm corresponding to the norm of the Convention to the Court, while they had to address that question to the CCs, the Protocol could prevent the latters from performing their function of the constitutional control effectively. Moreover, if a CC is not entitled with a right to request an advisory opinion, it should either to follow an advisory opinion issued upon a request of a HOC and disregard its own role in the state; or not to follow it and thus, create the tensions with the Convention.
8. It is not possible to rely on the preliminary reference procedure as the evidence that the advisory opinion will be successful in achieving its goals. Their main similarity is that both of them are based on the idea of enhancing the judicial dialogue by providing the national courts with a right to refer to the supranational courts. However, the very essence of the procedures is different. Moreover, the preliminary rulings are *de jure* binding for the courts of the Member States, while the advisory opinions are binding only *de facto* and the courts that do not follow them will not face any liability.
9. The CJEU in the Opinion 2/13 reasonably pointed out that the advisory opinion procedure could undermine the autonomy of the preliminary reference procedure prescribed by Article 267 TFEU and EU law as a whole. However, the role of the CJEU and its autonomy cannot be put higher than the protection of human rights, which is among the values of the European Union. At the same time, the autonomy of EU law cannot be neglected.

RECOMMENDATIONS

Basing on the analysis of advisory opinion procedure in the context of the European Union legal order, I would like to make the following recommendations.

1. The Protocol No. 16 provides that the advisory opinions are not binding for the national courts. The research, however, has shown that they will have *res interpretata* effect. Nevertheless, if a court does not follow an advisory opinion, it will face no liability. The effectiveness of the advisory opinion procedure, however, will be neglected. So, it would be better to establish a control mechanism over the follow-up of the advisory opinions issued upon the requests of the national courts.
2. The advisory opinion procedure may put the additional burden on the Grand Chamber. So, it would be better to establish an additional body that will be responsible for considering the requests and issuing the advisory opinions.
3. There is a need to establish the strict criteria for when the ECtHR may reject to accept the requests for the advisory opinions in order to ensure that the national courts have a clear understanding of these criteria and do not burden the Court with the knowingly inadmissible requests.
4. It is necessary to provide the tight deadlines when each stage of the consideration of a request should be completed in order make the procedure faster and not to delay the consideration of a claim in a national court.
5. It would be better for the national authorities in those countries that have the constitutional control mechanism to indicate no any other but the Constitutional Courts as ones having right to refer for the advisory opinions. The High Ordinary Court should be entitled with this right only if their final decisions are not subject to the constitutional control performed by the Constitutional Courts.
6. In order to ensure protection of human rights in the European Union in full compliance with the Convention and at the same time to safeguard the autonomy of EU law, it would be better to take into account the Opinion 2/13 and to provide the mechanism that will regulate the relationship between the advisory opinion and the preliminary reference procedures. Namely, it should be regulated when and under which conditions a national court of the Member States should refer to the ECtHR and when to the CJEU.

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ABSTRACT

Master Thesis is devoted to the study of the advisory opinion procedure prescribed by the Protocol No. 16 to the European Convention on Human Rights or, to be more precise, to the study of the value of this procedure for the protection of human rights in the European Union. The Master Thesis is aimed on establishing whether the advisory opinion procedure could become an effective tool for improving the human rights protection in the Union.

The main objectives of the Thesis were to analyse the provisions of the Protocol No. 16 and to find out whether the aims of the Protocol could be achieved and what will be the obstacles, if any, for doing this; and to establish how the advisory opinion procedure will influence the national courts and EU law.

The research has shown that the advisory opinion procedure will enhance the judicial dialogue between the Court and the national courts and will ensure establishing higher human rights protection standards. However, there are still some doubts that the procedure will decrease the Court's workload due to the length of the procedure, the additional burden that will be put on the Grand Chamber, etc. Moreover, the Protocol may prevent the Constitutional Courts from effective realization of the function of constitutional control and can interfere into the relationship between the Constitutional Courts and the Highest Ordinary Courts. The main concern about the non-binding nature of the advisory opinions was, however, refuted. Besides, the research has shown that the Court of Justice of the European Union in Opinion 2/13 reasonably stated that the advisory opinion procedure could undermine the autonomy of EU law that neither can be put higher than the protection of human rights, nor being neglected.

Key words: European Convention on Human Rights, European Court of Human Rights, advisory opinion procedure, European Union, Protocol No.16

SUMMARY

The Protocol No. 16 to the European Convention of Human Rights is a new instrument of the Council of Europe aimed at ensuring better protection of the human rights by strengthening the dialogue between the national courts and tribunals and the European Court of Human Rights. The aim of the Master Thesis is to analyse the provisions of the Protocol No. 16 to the ECHR and to establish how the advisory opinion procedure prescribed by it could influence the protection of human rights in the European Union. In order to achieve this aim, the Master Thesis has as its objectives to analyse the provisions of the Protocol and to find out whether its aims could be achieved and what will be the obstacles, if any, for doing this; to establish how the advisory opinion procedure will influence the protection of human right on the national level and on EU law; to conduct a comparative analysis of the preliminary reference and the advisory opinion procedure in order to establish whether the advisory opinion procedure will have the same success; and to analyse whether this procedure could undermine the autonomy of EU law and whether this autonomy could be put higher than the human rights protection.

The Thesis consists of two Chapters that are divided into the subchapters. The aim of the Chapter I is to characterise the preconditions for the adoption of the Protocol and to describe the history of its adoption. Moreover, the aims and the main provisions of the Protocol are described in Chapter I. Chapter II of the Master's Thesis is aimed at analysing the advisory opinion procedure in the context of EU legal order, namely how it will influence of the national courts and will coexist with the preliminary reference procedure.

The idea of the advisory opinion procedure is that the Court will provide the national courts and tribunals with the guidelines on the application of the Convention and its protocols. This should lead to more objective and justified decisions taken by the national courts and hence, to eliminate the grounds to submit the individual applications to the ECtHR. This, in turn, should provide the Court with a possibility to consider other individual applications, e.g., from the individuals who are the citizens of the HCPs that have not ratified the Protocol, more effectively and thus, to ensure better human rights protection when the level of the ECtHR.

The research has shown that the advisory opinion procedure will become an effective tool for strengthening the judicial dialogue between the national courts and the ECtHR and, hence, to enhance the human rights protection in the Union. However, there are some doubts that the advisory opinion procedure will decrease the Court's overload. These doubts are based on the fact that the advisory opinion procedure will be quite lengthy. Moreover, it will put additional burden on the

Grand Chamber that will be responsible not only for the consideration of the applications according to Articles 30, 31 ECHR, but also for the consideration of the requests for the advisory opinions. Moreover, the Protocol may interfere into the relationship between the Constitutional Courts and the Highest Ordinary Courts if the latter ones are entitled with a right to request the advisory opinions. Moreover, it may prevent the Constitutional Courts from effective realization of the function of constitutional control since the Protocol does not take their special status into consideration.

The research has, however, shown that the advisory opinions will have *res interpretata* effect and will be *de facto* binding for the national courts and for the Court itself. Thus, the issue that seems to be the biggest concern for someone cannot be put under a question.

Besides, the research has shown that the CJEU's opinion that the advisory opinion procedure would undermine the autonomy of EU law is not groundless. However, this autonomy should not be put higher than the human rights protection. Instead, there is a need to provide a mechanism that will balance the coexistence of the advisory opinion and the preliminary reference procedures. Talking about the preliminary reference procedure, it is worth also mentioning that these two procedures are different in their very nature and the aims set for them are also different. Thus, it is not possible to say that the Protocol No. 16 will have the same success as Article 267 TFEU, which provides the preliminary reference procedure, has.

At the end of the research, the further conclusion can be made. The advisory opinion procedure prescribed by the Protocol No. 16 to the ECHR could become an effective tool for the human rights protection in the European Union. Nevertheless, it is better to develop some instruments that will eliminate the concerns underlined above.

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HONESTY DECLARATION
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