

## 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

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### A. Preliminary Remarks

On 2 October 2013, Protocol No. 16 to the European Convention on Human Rights (ECHR) was opened for signature by the Member States of the Council of Europe (CoE). The protocol, that has so far been signed by sixteen States and ratified by Albania, Georgia, Lithuania, San Marino and Slovenia,<sup>1</sup> will enter into force in case of ratification by at least ten Member States. If the protocol becomes effective, it will expand the European Court of Human Rights' competence to give advisory opinions<sup>2</sup> upon request by domestic high courts and tribunals.

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<sup>1</sup> According to the chart of signatures and ratifications, as of 20 April 2015 and since the date of opening for signatures, Albania, Armenia, Estonia, Finland, France, Georgia, Italy, Lithuania, the Netherlands, Norway, Romania, San Marino, Slovakia, Slovenia, Turkey, and Ukraine had signed Protocol no. 16, while Albania, Georgia, Lithuania, San Marino, and Slovenia also ratified it.

<sup>2</sup> Prior to the adoption of the protocol, a very limited advisory competence was already conferred on the Court, on the basis of Article 47 ECHR. However, an advisory opinion could be requested only by the Committee of Ministers and could be delivered by the Court only on issues not involving the interpretation of the rights provided in the Convention. The strong limits, *ratione personae* as well as *ratione materiae*, in order to request and obtain an opinion, made the clause ineffective: in fact, since the adoption of the Convention, the Court has only delivered two opinions *re* Article 47. On this point, see Kanstantsin Dzehtsiarou & Noreen O'Meara, *Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for dialogue and docket-control?*, 3 LEGAL STUDS. 444–68 (2014).

Indeed, the aim of the protocol is to guarantee greater involvement of domestic judges in the Convention system.<sup>3</sup> It aims at securing the correct interpretation and implementation of Convention rights through a strong interaction with the European Court of Human Rights (ECtHR). The protocol, in fact, is perfectly in line with the final *telos* of the ECHR and of the CoE in general, which was established in the aftermath of one of the most brutal conflicts in world history in order to provide legal mechanisms for the implementation of the principles of democracy, human rights, and the rule of law.

However, there is a danger that a mechanism established to fulfill such prominent objectives might collide with some concrete problematic aspects, concerning, in particular, the interaction between national and supranational judicial systems. The fulfillment of these objectives might be frustrated by possible conflicts over the competences of ordinary and Constitutional Courts, at the domestic level, as well as between constitutional judges and the ECtHR, and over the complex triangular relationship between Constitutional Courts, the ECtHR, and the Court of Justice of the European Union (CJEU), at the supranational level. In particular, the reaction of Constitutional Courts is a matter of concern. This is particularly so given that these Courts have, since the end of the Second World War, been considered to be the main actors in the protection of fundamental rights in Europe, and are now sidelined by supranational courts and by the direct relationship the latter have either with ordinary judges or citizens.

In the following article it is argued that, on the one hand, and also in the light of the experience accrued within other supranational systems, Protocol No. 16 could represent a challenge for Constitutional Courts' autonomy when dealing with constitutional review of legislation. This is because the advisory opinion mechanism might trigger a centralization in the interpretation of fundamental rights enshrined in the ECHR in the hands of the ECtHR - fundamental rights that are likewise enshrined in national Constitutions. On the other hand, the effective enforcement of the new mechanism largely relies on the attitude that will be shown by national courts, first of all by constitutional judges, as well as the ECtHR itself in using this device. In the end, not only are the Contracting Parties of the ECHR free to decide on whether to sign Protocol No. 16 and to determine which national courts constitute "highest courts and tribunals," but the (authorized) national judges also enjoy discretion about the extent to which they want to resort to the ECtHR's advisory opinions. In other words, the degree of engagement in the European judicial conversation depends primarily on national Constitutional Courts and on the extent to which they see themselves

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<sup>3</sup> As stated by the judges of the European Court of Human Rights—and in particular by François Tulkens, vice-President of the European Court of Human Rights at that time—at a Seminar held in Strasbourg, on 27 January 2012, *How can we ensure greater involvement of national courts in the Convention system?* The report of the seminar is available on the ECtHR's website at [http://www.echr.coe.int/Documents/Dialogue\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Dialogue_2012_ENG.pdf). Among the scholars, see 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* 97 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 9–29 (2014).

as “agents” shaping European constitutional space.<sup>4</sup> The attitude of the ECtHR, in terms of its activism or, rather, self-restraint, in exploiting the requests for advisory opinions for strengthening its authoritative interpretation of the ECHR, can also make a critical difference.

However, for a Constitutional Court that decides to use the new mechanism, it might be difficult for it to disregard the opinion of the ECtHR, as well as the opinions rendered to other Courts on the same grounds and on similar factual situations. Given the dominant model of centralized review of legislation in Europe, this could limit the inclination of a Constitutional Court to employ the advisory opinion mechanism extensively.

Nevertheless, it cannot be neglected that Protocol No. 16 has the merit to support, at least formally, the strengthening of the relationship between the ECtHR and the highest domestic judges, albeit that it does so only in one direction. For whilst national courts seek guidance from the ECtHR on the interpretation of ECHR rights, the ECtHR cannot seek guidance from national Constitutional Courts on the interpretation of the same rights under national Constitutions.

This article aims to analyze both the strengths and the weaknesses of the new mechanism introduced by Protocol No. 16. It attempts to foresee what the attitude of Constitutional Courts vis-à-vis the new advisory opinions could be, by drawing inspiration from a comparative analysis with the practices of the preliminary reference procedure by Constitutional Courts before the CJEU and with the advisory opinion mechanism of the Inter-American Court of Human Rights (ICHR). The article proceeds as follows. Section B considers the practice of judicial interaction between domestic courts and the ECtHR. It starts from the context in which the “dialogue protocol” was drafted—a context characterized by the changing role of domestic judges in the control of conventionality and in the relationship with Constitutional Courts, in particular where constitutional review of legislation is centralized, as in most European countries. Section C then analyzes the differences and similarities of the new ECtHR advisory opinion mechanism in the light of the EU preliminary reference procedure, aiming to highlight the potential reception of the former by Constitutional Courts. Section D focuses on the jurisdiction of the ICHR to render advisory opinions upon referral by national authorities, as a case study that can allow for some predictions regarding the foreseeable impact of Protocol No. 16 to the ECHR on Constitutional Courts. Finally, Section E sets out the conclusions of this Article, and considers the results of the comparative analysis.

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<sup>4</sup> On this point, see Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this Special Issue.

## B. Protocol no. 16 to the European Convention on Human Rights: A New Role for Domestic Judges?

### *I. The Evolving Role of Domestic Judges in the Convention System*

The expansion of the role of domestic judges in the implementation of the ECHR, through interaction among judges as well as with the ECtHR, was already underway before the adoption of the protocol. After all, this was a legal requirement of the principle of subsidiarity, which is one of the cornerstones of the entire ECHR system.<sup>5</sup> Indeed, considering the universal dimension of human rights and the “dialogue” that is in place among judges, eminent authors have defined the Convention system as a pluralist<sup>6</sup> and cosmopolitan legal order.<sup>7</sup> According to those scholars, in this new and complex system, the relationship between institutions and sources of law is no longer based on the principle of hierarchy, but rather follows, on the contrary, the principle of heterarchy (“an interaction of different sub-orders that is not subject to common legal rules but takes a more open, political form”<sup>8</sup>), in which the judges play a central role.

However, the existing legal order is far from being perfect; it is based on a general principle the implementation of which is reserved mainly to informal and voluntary mechanisms. Indeed, it cannot be denied that domestic judges are the masters of the correct interpretation and implementation of fundamental rights, through mechanisms such as judicial interpretation and, in more problematic cases, review of domestic legislation, taking the ECHR as a standard. When performing these functions, domestic judges are often engaged in a dialogue with the European Court, whose case law is taken as a benchmark for the correct interpretation of fundamental rights. However, this dialogue is mainly indirect, is often hidden,<sup>9</sup> and is completely based on the will of national judges, who can deliberately decide to avoid any confrontation with the European judge.

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<sup>5</sup> According to Article 35(1) ECHR, “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.” This principle is even reinforced by the recently adopted Protocol no. 15 to the European Convention on Human Rights.

<sup>6</sup> On pluralism in the Convention system, see Nico Krish, *The Open Architecture of European Human Rights Law*, 11 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS (2007).

<sup>7</sup> On the ECHR as a cosmopolitan legal order, with the European Court as a “Constitutional Court,” see Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53–90 (2012).

<sup>8</sup> Nico Krish, *The Case for Pluralism in Postnational Law*, 12 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 2 (2009).

<sup>9</sup> On the cases of hidden or “implied” dialogue, see Rafael Bustos Gisbert, *XV Proposiciones generales para una teoría de los diálogos judiciales*, 95 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 30–31 (2012). Although “hidden,” this still amounts to a form of engagement according to VICKY JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* Chapter 3 (2013).

In this light, this section aims to explore Protocol No. 16, not only as the first formal instrument of direct interaction between domestic judges and the ECtHR, but also as a new mechanism that can produce indirect effects on the existing functions of judges, and on the dialogue among them, for the reinforcement of fundamental rights in Europe. In analyzing the possible effects of the protocol on the system already in place, it can be observed that, despite the fact that the introduction of the protocol must be considered an undeniably crucial step in the process of the expansion of a culture of “European rights,” important problems nevertheless remain unresolved. In particular, the mechanism of judicial referral to the European Court in order to obtain advisory opinions risks adding further complexity to an already complex landscape. In this context, the realization of the risk of confusion between the functions of ordinary and constitutional courts, to the detriment of the role of Constitutional courts, could be one of the major shortcomings.

## *II. The “Dialogue Protocol”*

As was hoped for by scholars quite a long time ago,<sup>10</sup> at the 2012 Brighton Conference it was stated that:

The Conference... notes 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.<sup>11</sup>

The idea that the correct implementation and interpretation of fundamental rights at the domestic level is strictly connected with a well-balanced cooperation between domestic judges and the ECtHR emerges clearly. Indeed, on the basis of these general principles, the Preamble to Protocol No. 16 states that the power to give advisory opinions upon judicial referral aims to “further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity.”<sup>12</sup>

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<sup>10</sup> Françoise Benoit-Rohmer, *Les perspectives de réformes à long terme de la Cour Européenne des droits de l’homme: “certiorari versus renvoi préjudiciel”* REVUE UNIVERSELLE DES DROITS DE L’HOMME 7–8 (2002).

<sup>11</sup> Brighton Declaration, 12.d.

<sup>12</sup> Protocol No. 16 to the ECHR, Preamble.

Therefore, with the aim of strengthening the dialogue between domestic judges and the ECtHR, Article 1.1 of the Protocol confers to the “highest courts and tribunals of a High Contracting Party” the power to “request the Court to give advisory opinions.” The courts authorized to refer shall be indicated by each Contracting Party, by means of a declaration that shall be submitted at the time of the signature or ratification of the protocol. The declaration is not binding, since Parties retain the power to modify it at any time.<sup>13</sup>

The jurisdictions authorized to seek an advisory opinion should be involved in a pending process.<sup>14</sup> This means that among the authorities indicated by the Contracting Parties, only those effectively exercising judicial power in the context of a pending process can seek an opinion from the ECtHR. Therefore, the referral has a concrete nature, with abstract review of legislation not being allowed.<sup>15</sup>

The decision of the ECtHR regarding judicial referral is not considered to be the last stage of domestic controversies. Its aim, rather, is to give an opinion only on “questions of principle relating to the interpretation or application” of the ECHR rights and freedoms.<sup>16</sup> Here, the analogy with the power of referral of tribunals to Constitutional Courts in the majority of the European systems of constitutional review of legislation is evident.

Moreover, even the task of interpreting the legal issues concerning fundamental rights protected under the ECHR is not left entirely to the ECtHR, for the decision of the Court is to be based on the legal and factual background of the pending case provided by the domestic jurisdiction.<sup>17</sup> This means that even the question of interpretation is not to be simply transferred to the ECtHR, but is to be solved on the basis of the interaction between the “preliminary” interpretation of the domestic judge and the “final” interpretation of the ECtHR. To this end, the domestic judge is to present, in particular: (i) the subject matter of the domestic case and the relevant findings of fact; (ii) the relevant domestic legal provisions and the Convention issues raised; (iii) the arguments of the parties; and (iv), the views of the domestic judge on the question.<sup>18</sup>

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<sup>13</sup> Art. 10 of the Protocol.

<sup>14</sup> Art. 1.2 of the Protocol.

<sup>15</sup> See the Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, point 10, [http://www.echr.coe.int/Documents/Protocol\\_16\\_explanatory\\_report\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf) [hereinafter Explanatory Report].

<sup>16</sup> Art. 1.1 of the Protocol, second part.

<sup>17</sup> Art. 1.3 of the Protocol.

<sup>18</sup> Explanatory Report at point 12.

When reading the text of Protocol No. 16, therefore, the aim of its drafters to reinforce the dialogue among judges in the ECHR system emerges clearly.<sup>19</sup> Nevertheless, when analyzing the possible concrete effects of its implementation, a number of doubts can be raised as to its ability to fulfill this overarching aim, as will be demonstrated in the following paragraphs.

### *III. The Impact of Protocol No. 16 to the European Convention on Human Rights on the Existing Functions of Judges and Their Interaction with Supranational Judges*

In the ECHR system, domestic judges have always had a crucial role in implementing fundamental rights,<sup>20</sup> and, when necessary, in solving the conflicts<sup>21</sup> deriving from the interaction between supranational and national sources of law. In this regard, reviewing the studies devoted to this phenomenon, it is possible to classify the functions of judges into two categories: a) interpretation of domestic legislation in conformity with the ECHR and, in the event that the conflict cannot be solved by interpretative means, b) review of domestic legislation deemed to conflict with the ECHR. The second mechanism can take two forms: (i) the control of conventionality, which is usually performed by ordinary judges, though sometimes also by Constitutional Courts, and (ii) the control of constitutionality, performed by Constitutional Courts. Protocol No. 16, which adds the power of domestic courts and tribunals to request advisory opinions from the ECtHR, introduces a new mechanism of dialogue between national judges and the ECtHR. This, however, does not appear able to correct the imperfections of the existing system of judicial interaction.

#### *1. The Impact of Protocol No. 16 on Judicial Interpretation of Domestic Legislation in Conformity with the Convention*

Following the integration of the ECHR into European legal systems, the interpretative power of domestic judges started to become more relevant.<sup>22</sup> Judicial interpretation,

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<sup>19</sup> It is not by chance that the President of the European Court of Human Rights, Dean Spielmann, in his speeches defined the protocol as “the dialogue protocol”, as pointed out, among the Italian scholars, by E. Nalin, *I protocolli n. 15 e 16 alla Convenzione europea dei diritti dell’uomo*, in *I GIUDICI DI COMMON LAW E LA (CROSS)FERTILIZATION: I CASI DI STATI UNITI D’AMERICA, CANADA, UNIONE INDIANA E REGNO UNITO 119–50* (Pamela Martino ed., 2014).

<sup>20</sup> Among the Italian scholars, a number of studies by Antonio Ruggeri are devoted to the role of judges in the multilevel system of fundamental rights. With particular reference to the effects of the adoption of Protocol No. 16 on the expansion of judicial functions, see Antonio Ruggeri, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all’adesione dell’Unione alla Cedu e all’entrata in vigore del prot. 16)*, 1 *RIVISTA DELL’ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI* (2014).

<sup>21</sup> On the crucial role of conflicts in the EU legal system, see Giuseppe Martinico, *The “Polemical” Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this Special Issue.

<sup>22</sup> According to Jan Polakiewicz, “the main responsibility for ensuring the observance of the Convention in domestic law lies with the legislature and the judiciary.” Jan Polakiewicz, *The Status of the Convention in National*

indeed, has the power to “create links between legal orders even in the absence of expressed norms of connection.”<sup>23</sup> Among the mechanisms of coordination between domestic legal systems and the ECHR, consistent judicial interpretation has, therefore, emerged as one of the most relevant, reflecting a trend similar to that of the coordination between national and supranational systems within the European Union.<sup>24</sup>

In some cases, interpretation that is consistent with the ECHR and its jurisprudence is a duty imposed on national judges by the statutes incorporating the ECHR,<sup>25</sup> as in the case of the United Kingdom<sup>26</sup> and Ireland.<sup>27</sup> In those cases where statutes do not impose such a judicial duty, Constitutional Courts often introduce this same rule.<sup>28</sup> Consequently, both types of jurisdiction usually take ECHR jurisprudence into consideration, and, as a result, ECtHR judgments are often quoted by national jurisdictions, even if they concern other states. In these cases, an obligation to take into account European and international law in judicial interpretation is usually considered by Constitutional courts to be indirectly based

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*Law, in* FUNDAMENTAL RIGHTS IN EUROPE. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000, 31–53 (Robert Blackburn & Jörg Polakiewicz eds., 2001). Alec Stone Sweet and Helen Keller add also administrative officials. Alec Stone Sweet, Helen Keller, *The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS. THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS, 3–712 (Robert Blackburn & Jörg Polakiewicz eds., 2008).

<sup>23</sup> GIUSEPPE MARTINICO & ORESTE POLICINO, THE INTERACTION BETWEEN EUROPE’S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS 6 (2012).

<sup>24</sup> In this sense, see Giuseppe Martinico, *Is the European Convention Going To Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 2 EUR. J. INT’L L. 401–24 (2012).

<sup>25</sup> As Martinico points out, Art. 10 of the Spanish Constitution, Art. 20(1) of the Romanian Constitution, and Art. 5 of the Bulgarian Constitution are examples of the constitutional duty to follow the European Convention in judicial interpretation of national legislation. The case of the UK is an example of legal duty of consistent interpretation. Martinico, *supra* note 24,

<sup>26</sup> Section 3(1) of the *Human Rights Act*, indeed, provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

<sup>27</sup> Section 2.1 of the *European Convention on Human Rights Act*, in fact, states, “[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.” In so far as the incorporation of the European Convention into domestic systems is concerned, the cases of UK and Ireland are considered “relatively ‘like cases.’” See Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, in A EUROPE OF RIGHTS 34–106, *supra* at note 22.

<sup>28</sup> This happens in particular in the Baltic countries. See in particular the cases of Latvia (Constitutional Court, judgments n. 2000–03–01 of 30 Aug. 2000 and n. 2006–03–0106 of 23 Nov. 2006). All cases are cited by Martinico, *supra* note 24.



on the Constitution, and examples of this include the so-called “hinge provisions” in the German Basic Law and Article 117 of the Italian Constitution.<sup>29</sup>

The capacity of the mechanism of consistent judicial interpretation to reinforce the culture of rights in Europe is more than evident. However, the risk of conflicting interpretations of the same rights, in some cases even in the same country, is clear. Moreover, this system, being based only on the will of each court to refer to European standards and case law in the interpretation of rights, could produce asymmetries. The introduction of the ECtHR’s advisory competence, conferring on the Court a general power to give the “final interpretation”, could offer a solution to these problems. Nevertheless, requesting an advisory opinion from the ECtHR is not a duty, but a mere right of domestic courts, which may deliberately decide to forego the “European Court test.”

From this perspective, the adoption of Protocol No. 16 does not, therefore, produce any new positive effects on the existing system of interaction between the jurisprudence of the European and the domestic courts. This interaction instead remains based on a voluntary system, the effects of which can vary, depending on the will and the sensitivity of the actors involved.

However, the picture concerning the effects of the interpretation provided by the ECtHR on the case law of the domestic courts in case of ratification of the protocol might be more complicated. Indeed, Article 5 of the Protocol, according to which an advisory opinion, once adopted, is not binding, must be coordinated with point 27 of the Explanatory Report, which states that:

They [*the 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.

Therefore although it is up to the requesting Court to decide on the effects of the opinion in the pending case,<sup>30</sup> it is quite predictable that ECtHR judgments will have a stronger effect than would be derived from Article 5 of the Protocol—or at least in those cases

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<sup>29</sup> References to the role of Constitutional Courts in the dialogue with the ECtHR can be found in the reports of the XVI Conference of the European Constitutional Courts, Vienna, Constitutional Court of Austria, 12–14 May 2014, devoted to “The cooperation of Constitutional Courts in Europe. Current situation and perspectives” (*available at* <http://www.confueconstco.org>).

<sup>30</sup> Explanatory report at point 25.

where the ECtHR will adopt a decision on the basis of a “well-established” interpretation of ECHR rights<sup>31</sup>—in a way which is not completely different from the system of judicial referral to the CJEU (as it will be argued in Section C.IV).

## *2. The Impact of Protocol No. 16 on the Power of Judges to Review Domestic Legislation Deemed to Contrast with the Convention*

In cases where a sharp conflict arises between the national and the Convention systems, consistent interpretation would not offer a final solution. In such cases, and where a stronger approach is needed, the only solution may be to review national legislation deemed to contrast with the supranational norms.

With the control of conventionality, cases of conflict between national legislation and the ECHR are solved by “ordinary” domestic judges, who disregard national legislation and directly apply the ECHR provisions. This mechanism, which is based on the principle of the direct effect of supranational legislation, is particularly common in monistic countries where a system of control of constitutionality of legislation is not provided. As a result, in the hands of ordinary judges, the decentralized system of conventional review of legislation compensates for the lack of constitutional review of legislation.

This is the case, for example, of France until 2008 and the Netherlands.<sup>32</sup> Indeed, in France, where *a posteriori* constitutional review of legislation was not provided until the 2008 constitutional reform, the power of domestic judges to exercise the control of conventionality of domestic legislation, on the basis of Article 55 of the Constitution,<sup>33</sup> has been recognized by the *Conseil constitutionnel* itself. However, the *Conseil constitutionnel* refused to exercise this power, stating that constitutional judges are provided with the power of control of constitutionality, while the control of conventionality is reserved to

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<sup>31</sup> As can be derived by decision no. 49/2015 of the Italian Constitutional Court, according to which Strasbourg case-law is binding for domestic judges, only when based on an established jurisprudence. While, according to some authors, the decision is an expression of “constitutional patriotism,” intended to put strong limits on judicial interaction (Antonio Ruggeri, *Fissati nuovi paletti dalla consulta a riguardo del rilievo della CEDU in ambito interno. A prima lettura di Corte cost. n. 49 del 2015*, DIRITTO PENALE CONTEMPORANEO (2015), [http://www.penalecontemporaneo.it/upload/1427919457RUGGIERI\\_2015a.pdf](http://www.penalecontemporaneo.it/upload/1427919457RUGGIERI_2015a.pdf); Diletta Tega, *La sentenza della Corte costituzionale n. 49 del 2015 sulla confisca: il predominio assiologico della Costituzione sulla Cedu*, FORUM DI QUADERNI COSTITUZIONALI (2015), [http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/04/nota\\_49\\_2015\\_tega.pdf](http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/04/nota_49_2015_tega.pdf)), according to others, it is an expression of “functional disobedience,” that is a natural and positive effect of judicial dialogue (Giuseppe Martinico, *Corti costituzionali (o supreme) e “disobbedienza funzionale”*, DIRITTO PENALE CONTEMPORANEO (2015), [http://www.penalecontemporaneo.it/upload/1430150015MARTINICO\\_2015.pdf](http://www.penalecontemporaneo.it/upload/1430150015MARTINICO_2015.pdf)).

<sup>32</sup> In France, at least until the 2008 constitutional reform.

<sup>33</sup> Stating that “Treaties or agreements properly ratified or approved shall, upon their publication, have an authority superior to legislation, provided always that the relevant agreement or treaty is applied by the other party.”

ordinary judges. As a result, an extensive use of this power followed, firstly by the Court of Cassation and later also by the *Conseil d'Etat*,<sup>34</sup> and for a long time the control of conventionality was the only possible *a posteriori* review of legislation in France.

The case of the Netherlands is similar. The Constitution itself, while prohibiting any form of constitutional review of legislation,<sup>35</sup> provides for the control of conventionality of domestic legislation. Article 93 thus states that international treaties are binding, and Article 94 explicitly provides that: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." Judicial review of conventionality of legislation has, therefore, a constitutional basis in the Netherlands, even though the courts tend to use this instrument with caution, avoiding excessive interference with the powers of Parliament.<sup>36</sup>

In Belgium, the evolution of the role of judges with regard to the ECHR reflects the evolution of the attitude of the State towards international law and the progressive transformation of constitutional review of legislation in Belgium. Indeed, as far as the relationship between national and international law is concerned, until 1971 the Belgian legal system was based on the dualistic theory. However, this trend was reversed following the adoption, in 1971, by the Supreme Court of Appeal, of the judgment in *Franco Suisse Le Ski*, where, for the first time, the direct effect of international treaties was recognized. From the end of the 1970s onwards, this principle was progressively applied also with reference to the ECHR.<sup>37</sup> A decentralized system of review of statutes deemed to conflict with fundamental rights (whose recognition was based on the ECHR) therefore emerged. This trend reinforced the system of constitutional review of legislation, a power that was only gradually recognized as pertaining to the Belgian Constitutional Court.<sup>38</sup>

However, the control of conventionality is also exercised by ordinary judges in countries where there is a system of constitutional review of legislation already in place. In these cases, control of constitutionality and control of conventionality, with reference to

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<sup>34</sup> Catherine Dupré, *France*, in *FUNDAMENTAL RIGHTS IN EUROPE*, 313–33, *supra* note 22.

<sup>35</sup> Article 120 Const. states, "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

<sup>36</sup> See Erika De Wet, *The Reception Process in the Netherlands and Belgium*, in *A EUROPE OF RIGHTS*, *supra* note 22, at 229–309.

<sup>37</sup> After the adoption of the decision of the European Court of Human Rights in the case *Marckx v. Belgium*.

<sup>38</sup> The competence to review the compatibility of statutes with reference to all fundamental rights was assigned to the Belgian *Cour d'Arbitrage* only in 2003. In 2007 its name was changed to *Cour Constitutionnelle*.

fundamental rights, coexist. This is the case, for example, of Spain<sup>39</sup> and Austria,<sup>40</sup> as well as of most Central and Eastern European countries, such as Bulgaria,<sup>41</sup> Romania, and Moldova.

Judicial review of legislation in conflict with ECHR rights is very rarely applied in dualistic countries, as the case of the United Kingdom shows clearly. The Human Rights Act, in fact, confers upon judges only the power to make a “declaration of incompatibility” between the statute and the ECHR, while no power of review of legislation with regard to the ECHR is admitted, according to the principle of Parliamentary sovereignty.<sup>42</sup> Even in Italy, judicial “disapplication”<sup>43</sup> of statutes in contrast with the ECHR—on the model of the mechanism in force with reference to the EU treaties—has been stopped by the Constitutional Court, with Decisions no. 348 and 349 of 2007<sup>44</sup>.

In all the aforementioned cases, the transformative effect of the ECHR on the role of judges in domestic legal systems cannot be ignored, even though it must not be overestimated.<sup>45</sup> Apparently, these judges play the role of “watchdogs” over the correct implementation and interpretation of fundamental rights, as defined at both national and supranational levels, and, in performing this function, they sometimes tend to exercise a quasi-constitutional role. Thus, an evident effect of the ECHR is the great expansion of the powers of ordinary domestic courts, in many instances to the detriment of Constitutional Courts.

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<sup>39</sup> Article 96.1 Const. states, “Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.”

<sup>40</sup> Where the European Convention on Human Rights has been incorporated into the Constitution.

<sup>41</sup> Article 5(4) Const. provides that “International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.” However, domestic judges have shown certain self-restraint in the exercise of this power.

<sup>42</sup> Robert Blackburn, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE*, 935–1008, *supra* note 22.

<sup>43</sup> Namely when a domestic statute is not applied to the case but nevertheless remains in force in the legal system.

<sup>44</sup> On the effects of the ICC 2007 judgments, see, critically, Oreste Pollicino, *The European Court of Human Rights and the Italian Constitutional Court: No “Groovy King of Love,”* in *THE UK AND EUROPEAN HUMAN RIGHTS. A STRAINED RELATIONSHIP?*, 361–77 (Katja S Ziegler, Elizabeth Wicks & Loveday Hodson eds., 2015)

<sup>45</sup> As Giuseppe Martinico pointed out, on one side, the judges usually make use of the power of “disapplication” of domestic legislation with caution, and, on the other, in a growing number of countries, Constitutional Courts are setting constitutional limits on the prevalence of conventional legislation over domestic statutes, on the model of the theory of counter-limits within the EU system. MARTINICO, *supra* note 24.

The power to review domestic legislation deemed to conflict with the ECHR has so far been exercised very rarely by Constitutional Courts. Austria is the most famous example of this. Austria is a monistic country, whose Constitution does not provide for a bill of rights, and, since 1964, it has been admitted that in the Austrian legal system the ECHR has constitutional status. Consequently, conflicts between domestic legislation and the ECHR can result in a declaration of unconstitutionality by the Federal Constitutional Court, while possible problems of conflict between the ECHR and the Constitution are solved according to the principle *lex posteriori derogate legi priori*.<sup>46</sup> Constitutional Courts, therefore, seem to be the main “losers” in the process of the “Europeanization” of rights under the ECHR system, and the introduction of Protocol No. 16 does not seem to have the power to reinforce their role, as will be demonstrated in the following paragraph.

#### *IV. Ordinary and Constitutional Courts in the European Convention System: Overlapping Functions*

As an effect of the multiplication of mechanisms of interaction among judges, a process of gradual overlapping of functions between ordinary and constitutional courts has been emerging in the ECHR system.<sup>47</sup> Indeed, in the absence of any specific rule at the supranational as well as the national level, both ordinary and Constitutional Courts spontaneously started to provide consistent interpretation, as well as reviewing domestic legislation deemed to contrast with the European standards.

In particular, the duty to interpret national legislation in a manner that is consistent with the ECHR and its jurisprudence is implemented indifferently by ordinary as well as Constitutional Courts.<sup>48</sup> The control of conventionality of legislation in contrast with the ECHR is a power exercised quasi-exclusively by the ordinary courts, while the power of control of constitutionality in cases of infringement of ECHR rights is very rarely exercised

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<sup>46</sup> On the effects of the European Convention on Human Rights in the Austrian legal system, see Daniela Thurnherr, *The Reception Process in Austria and Switzerland*, in *A EUROPE OF RIGHTS*, 311–86, *supra* note 22. On the consequences of the constitutional status of the European Convention in the Austrian legal system with reference to the relationship between national legislation and EU legislation, see Andreas Orator, *The decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: an instrument of leverage or rearguard action?*, in this Special Issue.

<sup>47</sup> With reference to the EU, as well as the ECHR, Antonio Ruggeri points out the risk of imbalances between ordinary courts, Constitutional courts and European courts in the system for the protection of fundamental rights in Europe. See Antonio Ruggeri, *Tutela dei diritti fondamentali, squilibri nei rapporti tra giudici comuni, Corte costituzionale e Corti europee, ricerca dei modi con cui porvi almeno in parte rimedio* (2012), available at [www.giurcost.org](http://www.giurcost.org).

<sup>48</sup> References can be found in the reports of the XVI Conference of the European Constitutional Courts, Vienna, Constitutional Court of Austria, 12–14 May 2014, devoted to “The cooperation of Constitutional Courts in Europe. Current situation and perspectives” (available at <http://www.confueconstco.org>).

by Constitutional Courts.<sup>49</sup> However, as already stated, considering the similarities with the decentralized system of control of constitutionality, the effects of control of conventionality can easily be assimilated to constitutional review of legislation of internal laws in conflict with the ECHR. As a result, the powers of ordinary and constitutional courts, in this regard, are clearly overlapping. At the same time, both ordinary and Constitutional Courts are losing most of their autonomy in deciding cases concerning fundamental rights. As a result, the role of both ordinary and constitutional judges in the European system is clearly facing a dramatic transformation.<sup>50</sup>

In this landscape, it is more than evident that there is a risk of duplication of functions between the ordinary and Constitutional Courts, with a consequent marginalization of the role of Constitutional Courts, gradually assimilated to all other apex courts, as well as asymmetries among CoE countries, due to a number of national variables, including in particular the approach to supranational law, as well as the rules on the organization of the judiciary in each legal system.

Protocol No. 16 does not seem to offer a viable solution to these shortcomings. Indeed, as already mentioned, Article 1.1 of the Protocol refers generically to the “highest courts and tribunals of a High Contracting Party.”<sup>51</sup> This choice is at the same time both exclusive and inclusive. It is exclusive since not all courts, but only those sitting at the apex of the judicial system, are authorized to request an advisory opinion. It is inclusive because, as is pointed out in the explanatory report, the term “highest” (instead of “the highest”) refers not only to constitutional and supreme courts, but also to all those tribunals that “although inferior... are nevertheless of especial relevance on account of being the “highest” for a particular category of case.” On this basis, it is to be expected that a wide range of tribunals, including also, but not only, Constitutional courts, would be authorized by the Contracting Parties to submit a request for an advisory opinion.<sup>52</sup>

With all this in mind, the request of advisory opinions may, on the one hand, generate problems of interaction between consultative and adjudicatory functions of the ECtHR (see

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<sup>49</sup> The Constitutional Court of Austria seems to be the only clear example in this sense.

<sup>50</sup> On the transformation of Constitutional Courts in the European legal order, see—among the Italian scholars—Marina Calamò Specchia, *La giustizia costituzionale, un sistema atipico in un ordinamento democratico? Spunti di riflessione sul ruolo delle Corti nei sistemi costituzionali aperti*, in ALLE FRONTIERE DEL DIRITTO COSTITUZIONALE. SCRITTI IN ONORE DI VALERIO ONIDA (Marilisa D’Amico & Barbara Randazzo eds., 2011).

<sup>51</sup> Art. 10 of the Protocol.

<sup>52</sup> As can be derived from the choice of Romania that has already indicated the jurisdictions authorized to request advisory opinions from the European Court: the High Court of Cassation and Justice, the Constitutional Court, as well as the Courts of Appeal. On the possibility that Constitutional Courts will be likely included, see Oreste Pollicino, *La Corte costituzionale è una “alta giurisdizione nazionale” ai fini della richiesta di parere della Corte EDU ex Protocollo 16?*, 2 DIRITTO DELL’UNIONE EUROPEA 293–315 (2014).

on this point Sections C and D) and, on the other hand, it may suddenly become a new “battleground” for competition between different types of courts, fulfilling competing aims, including, in particular, apex ordinary and Constitutional Courts (see Section C.II). The effect, if judges do not show a cooperative attitude, would be one of complicating an already complex architecture. Within this puzzle, moreover, another piece must also be taken into account. This is that, in CoE countries which are also members of the EU, all the aforementioned courts have also to “compete” with the CJEU, as Section C will show.

### **C. The Mechanism of the Advisory Opinions of the ECtHR from the Viewpoint of Constitutional Courts: What Can the Experience of the Preliminary Reference Before the CJEU Tell Us?**

At first glance, the procedure devised in Protocol No. 16 appears to generally resemble the preliminary reference procedure before the CJEU (Article 267 TFEU), whilst departing from it in some regards.<sup>53</sup> However, to what extent are these two mechanisms comparable from the viewpoint of Constitutional Courts in EU Member States? In this Section, it is argued that the effects and impact of these proceedings on Constitutional Courts are largely dependent on the actual use made by these courts and the ECtHR of Protocol no. 16, and may well result in Constitutional Courts being further sidelined in the European legal order. Moreover, should Protocol No. 16 enter into force, the triangular relationships between Constitutional Courts, the CJEU, and the ECtHR may become even more unpredictable in their development and more complex for applicants seeking restoration of their rights.

#### *1. The Overall Aim of the Two Mechanisms and the Impact on Constitutional Courts*

The aims of the advisory opinion procedure within the ECHR and the preliminary reference procedure in the EU are apparently very different because of the different *telos* of each international/supranational organization. While the former is primarily designed to create a dialogue between national highest jurisdictions and the ECtHR while the national proceeding is still underway, so as to guide national judges in interpreting and applying the ECHR,<sup>54</sup> the EU preliminary reference procedure was conceived and used by the CJEU in order to foster the unity and uniformity of EU law across the Member States.<sup>55</sup> These

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<sup>53</sup> See Janneke Gerards, *Advisory opinions, preliminary rulings and the new Protocol No. 16 to the European Convention on Human Rights*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 630-651(2014).

<sup>54</sup> The relationship between national courts and the ECtHR is not a new topic (see Laurence R. Helfer, *Redesigning the European Court of Human Rights. Embeddedness as a deep structural principle of the European human rights regime*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125–29 (2008); A EUROPE OF RIGHTS (Helen Keller & Alec Stone Sweet eds., 2008) 687–688, *supra* at note 22, although it will be reshaped and will become more formalized as a result of Protocol No. 16.

<sup>55</sup> Compare ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 97 (2006). On the different scope and reach of the EU and the ECHR and on the different role played by the two supranational courts, see MARTINICO & POLLICINO, *supra* note 23.

different objectives reflect the differing natures of the two organizations: whilst the CoE is a human rights organization, which is in principle unwilling to set out a harmonized human rights policy for its forty-seven Contracting Parties,<sup>56</sup> the EU is primarily a regional integration process, with the CJEU acting as the first engine of the harmonization of national legal systems. Indeed, the CJEU was considered to be first and foremost a guarantor of EU competences, starting with the internal market, and a guarantor also of the separation of powers within the EU, rather than a human rights protector.<sup>57</sup>

In practice, however, given the principle of primacy (which has superseded even national constitutional norms) and the increasing case law on fundamental rights, both pre- and post-Charter, the two supranational courts are potentially able to encroach upon one of the most important functions that European Constitutional Courts have, that is, the protection of fundamental rights entrenched in national Constitutions.

Moreover, both the advisory opinion mechanism and the preliminary reference mechanism are unidirectional. Only national courts and, in the case of Protocol no. 16, only the highest courts identified by each Contracting Party, can refer questions to the two supranational courts, and not the other way around. This is notwithstanding that the potential for intrusion into national constitutional systems by the supranational courts could have made the introduction of a two-way communication flow between the ECtHR/CJEU and Constitutional Courts desirable as a step before the supranational court takes a decision which is sensitive for the domestic Constitution. In this light, the question arises of whether, based on the actual functioning of the preliminary reference procedure before the CJEU, it is possible to predict that Constitutional Courts might appear reluctant in exploiting the new device introduced by Protocol No. 16.<sup>58</sup>

The different conceptions which underlie the two organizations and, hence, the two judicial procedures, are reflected in the fact that while all Member States' courts are involved in the enforcement of Article 267 TFEU (with the well-known differences between courts of first instance and appeal and courts of last resort), the mechanism of the advisory opinions can be subject to a selective application, since adherence to Protocol no. 16 is voluntary on the part of the CoE's members (Section B). Thus, the standardization of the

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<sup>56</sup> This is confirmed by the long-standing margin of appreciation doctrine, now entrenched in Protocol no. 15. See Federico Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, 15 ICOURTS WORKING PAPER SERIES 2015, forthcoming in *A FUTURE FOR THE MARGIN OF APPRECIATION?* (Mads Andenas, Eirik Bjorge & Giuseppe Bianco eds., 2015).

<sup>57</sup> Although a recent study has proven that at the very beginning of the process of European integration there was an (unsuccessful) attempt to make the European Community a truly human rights actor, particularly in order to preserve fundamental rights in the Member States. See Grainne de Búrca, *The Road Not Taken: The European Union as a Global Human Right Actor*, 4 AM. J. INT'L L. 653–64 (2011).

<sup>58</sup> See, for more details, Section C.V.



relationship between every single national highest court and the ECtHR, for the sake of the uniform application of the ECHR, is not at stake in the case of the advisory opinion procedure.

In turn, according to the discretion granted to each Contracting Party, the new mechanism of Protocol No. 16 is likely to involve Constitutional Courts in a very asymmetrical way, depending on whether national governments have opted in or not. Given the limited number of signatures to the Protocol collected since the date of opening almost two years ago, and that only five countries, at present, have completed the ratification process (Section B), it may well be that only 10 Constitutional Courts—ten being the minimum requirement for the Protocol to enter into force—will “take advantage” of the advisory opinion procedure. Thus, for most Constitutional Courts, the legal situation might not change. Furthermore, even if Protocol no. 16 is ratified by all Contracting Parties of the ECHR, Constitutional Courts would still enjoy full discretion in deciding whether to request advisory opinions from the ECtHR. Indeed, the implementation of the mechanism is completely reliant on the unilateral commitment of Constitutional Courts (and other indicated highest courts) to engage in a dialogue with the ECtHR. This unilateral commitment cannot be taken for granted at the moment of the signature in the light of the foreseen effects of this new device (see also Section E) and, at the same time, of the willingness of the ECtHR to respond to these request.

By contrast, in the EU, when the conditions of Article 267 TFEU are fulfilled, the Constitutional Courts of all Member States are obliged to issue a preliminary reference to the CJEU, although many of them have traditionally avoided doing so.<sup>59</sup> Constitutional Courts under Protocol no. 16 would not have such an obligation.

### *II. Judges Entitled to Ask for an Advisory Opinion and to Refer: Are the Constitutional Courts Like Any Other Courts?*

Neither the preliminary reference procedure nor the advisory opinion mechanism set out a special role for constitutional judges.<sup>60</sup> They stand as any other judge entitled to use that device and do not enjoy a *sui generis* treatment despite their access and jurisdiction, their procedure of appointment and composition, and the constitutional nature of the “material” they constantly manage—material which involves potential conflicts between

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<sup>59</sup> On the reluctance of Constitutional Courts and its gradual overcoming, especially in the last few years, see Monica Claes, *Luxembourg, here we come? Constitutional Courts and the preliminary reference procedure*, in this Special Issue. On the still hesitant attitude of some constitutional judges, in particular in Eastern Europe, see the articles of this Special Issue highlighting a missing link between Constitutional Courts and the CJEU.

<sup>60</sup> See also Section B.IV *supra* on this point. In the EU, the lack of engagement of the CJEU with Constitutional Courts as the referring courts has been often criticized by scholars and has been put forward as justification, in turn, of most Constitutional Courts’ timid attitude toward the preliminary reference proceeding. See, e.g., Leonard F. M. Besselink, *The parameters of constitutional conflict after Melloni*, 39 EUR. L. REV. 531–52 (2014).

the level of protection of fundamental rights under constitutional law and that ensured under the two supranational regimes. While Constitutional Courts, in the countries in which they operate, are usually considered, because of their powers, to be “special courts”, their specialty is devalued or simply overlooked by the EU treaties and the ECHR (and its protocols).

However, while Article 267 TFEU treats all national judges equally in terms of access to the preliminary reference procedure before the CJEU, with the only difference lying in the obligation to refer for the courts of last resort (Constitutional Courts included), Protocol no. 16 draws a clear line between highest courts and tribunals and other courts. Only the former are entitled to request advisory opinions from the ECtHR, provided that a case is pending before them and that the relevant legal and factual background of the case is set forth; the remaining courts are not. Nonetheless, as stated *supra* (Section B.IV), what a highest court or tribunal actually is rests wholly upon the discretion of each Contracting Party.<sup>61</sup>

What is important to highlight here is the lack of any particular acknowledgment in Protocol no. 16 of the role of Constitutional Courts and judicial bodies that carry out the constitutional review of legislation as being one of the ultimate guarantors of constitutional rights at the domestic level in most Contracting Parties.<sup>62</sup> It is the importance and the potential clash between performing the constitutional review of legislation and applying the ECHR that is neglected in Protocol no. 16. By speaking of highest tribunals, Protocol no. 16 only takes into account the function of judges of last resort in criminal, civil, and administrative matters, regardless of whether they can also review the constitutionality of the norm applicable to the case. The prospect of conflict between the effects of the review of constitutionality and conventionality is denied by the Protocol. For it to have been otherwise, the Protocol would have needed to have referred specifically to these kinds of review instead of identifying the relevant courts through their ranking in the judicial order.

The problem does not arise where there is a diffuse system of constitutional review of legislation in place, because the ultimate judicial authority, for instance a Supreme Court, is the court of last resort for both the review of constitutionality and conventionality at the same time. Neither does it arise where a Constitutional Court, like in Germany, or, albeit with some caveats, in Italy, reviews the compliance of legislation with both the Basic Law and the ECHR. However, more complex and peculiar are the situations in which the control

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<sup>61</sup> Art. 10, Protocol No. 16. On this point, see 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*, 2 EUR. L. REV. 229–47 (2013).

<sup>62</sup> Possibly with the only exceptions of countries like the UK and the Netherlands where no constitutional review of legislation is in place.

of conventionality is disjointed from that of constitutionality, as in France. In these circumstances, which courts should stand as the “highest courts” under Protocol no. 16: those having ultimate jurisdiction only for the conventionality review, thus excluding the Constitutional Court, or also those performing the constitutionality review (although they are not involved in checking the compliance of national law with the ECHR)? In other words, by reference to which function are the “highest courts” to be identified?

Even in the case of centralization of the review of constitutionality and conventionality in the hands of the same Constitutional Court, some problems could arise if other courts are considered by the Contracting Parties to be “highest tribunals” for the purpose of Protocol no. 16. Indeed, it is clear that the most sensitive context is the one in which the outcome of the control of conventionality and constitutionality may diverge. In this regard, Protocol no. 16 can create problems for intra-judicial relationships at a state level, especially between Supreme Courts and Constitutional Courts if both are considered “highest tribunals”. A Supreme Court might strategically use the advisory opinion procedure in order to seek guidance in the interpretation of the ECHR by the ECtHR and to narrow through this ‘external’ interpretation the discretion of the Constitutional Court in protecting a fundamental right.

A comparable case has already arisen in the context of the EU with the French Court of Cassation deciding to make a preliminary reference to the CJEU before involving the *Conseil constitutionnel* through the *control prioritaire de constitutionnalité*.<sup>63</sup> Under those circumstances, the CJEU confirmed that the preliminary reference takes precedence over the domestic reference, with a view to ensuring the uniform implementation of EU law as the supreme value.<sup>64</sup> This could be explained by the mandate of the CJEU as the supranational court that fosters the ultimate objective of “an ever closer union” (Article 1 TEU). By contrast, in the case of the advisory opinion procedure in the framework of Protocol No. 16, and given the rationale of the procedure, which does not aim at ensuring the uniform implementation of the ECHR as long as fundamental rights are protected, it should be for any Contracting Party to determine whether precedence should be given to constitutional review of legislation and thus to a preliminary reference of constitutionality by the Constitutional Court or, rather, to requesting an advisory opinion on the interpretation of the ECHR.

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<sup>63</sup> See, e.g., Joined Cases C–188 & C–189/10, *Melki and Adbeli*, 2010 E.C.R. I–05667 and the comment by Arthur Deyve, *The Melki Way: The Melki Case and Everything you Always Wanted to Know about French Judicial Politics (But Were Afraid to Ask)*, in *CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES* 309–22 (M. Claes et al. eds., 2012).

<sup>64</sup> See François-Xavier Millet & Nicoletta Perlo, *The first preliminary reference of the French Constitutional Court to the CJEU: révolution de palais or revolution in French constitutional law?*, in this *Special Issue*.

As a result, the position of constitutional judges in general can be challenged by the use of the advisory opinion procedure, like the preliminary reference procedure. Furthermore, the actual measures of implementation of Protocol No. 16 at the domestic level, depending on what are the “highest tribunals” identified, can transform a cooperative tool between the ECtHR and Constitutional Courts into a prospective limitation for the role of the latter courts.

### *III. The Prospective Impact of the ECtHR’s Docket Control on Advisory Opinions*

Protocol No. 16 can be better understood within the framework of a wider process of reform of the ECHR system, which finds its justification in the need to counterbalance the increasing workload of the ECtHR and the delay of its judgments.<sup>65</sup> By allowing the highest courts and tribunals to seek guidance on the correct interpretation or application of the ECHR in advance, it is thought that Protocol no. 16 could reduce the number of applications brought before the ECtHR.<sup>66</sup> However, this objective could not be reached if the number of requests for advisory opinions overwhelmed the activity of the Court, which has to deal with almost 65,000 pending cases as of 31 March 2015.<sup>67</sup>

Hence the idea of, firstly, limiting the requests for advisory opinions to the highest jurisdictions and, secondly, granting the ECtHR the possibility of not, with due reasons, delivering the requested opinion. The very high number of preliminary reference proceedings before the CJEU, indeed, derives mainly from the activism of the courts of first instance and appeal that allow the CJEU to have a say on many crucial issues for the deepening of the European integration process (direct effect, primacy, state liability, and so on).<sup>68</sup> By contrast, as stated, supreme and, even more so, Constitutional, Courts, have

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<sup>65</sup> See Vladimiro Zagrebelsky, *Parere consultivo della Corte europea dei diritti umani: vera e falsa sussidiarietà*, in LA RICHIESTA DI PARERI CONSULTIVI ALLA CORTE DI STRASBURGO DA PARTE DELLE PIÙ ALTE GIURISDIZIONI NAZIONALI. PRIME RIFLESSIONI IN VISTA DELLA RATIFICA DEL PROTOCOLLO 16 ALLA CONVENZIONE EUROPEA DEI DIRITTI DELL’UOMO 91 (Elisabetta Lamarque ed., 2015).

<sup>66</sup> The issue of whether such an objective can actually be achieved cannot be discussed here, but it suffices to say that most applications reaching the courts are due to systematic violations of the Convention and come from 4 contracting parties: Ukraine, Russia, Turkey, and Italy. The advisory opinions under Protocol no. 16 do not appear to redress such systematic violations, which are patent and well known by the competent domestic authorities, and, thus, to eliminate the cause of the high number of applications from those States. Moreover, nothing prevents an individual from lodging an application before the ECtHR (Art. 34 ECHR), even if the matter has been already addressed by the Court under the advisory opinion procedure. See Explanatory Report to Protocol no. 16, Art. 5; Gerards, *supra* note 53, at 636.

<sup>67</sup> See the statistics available on the website of the Court at [http://www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2015\\_BIL.pdf](http://www.echr.coe.int/Documents/Stats_pending_month_2015_BIL.pdf).

<sup>68</sup> See Harm Schepel & Erhard Blankenburg, *Mobilizing the European Court of Justice*, in THE EUROPEAN COURT OF JUSTICE 37 (Grainne de Búrca & Joseph H.H. Weiler eds., 2001); Thomas de la Mare & Catherine Donnelly, *Preliminary rulings and EU legal integration: evolution and stasis*, in THE EVOLUTION OF EU LAW 363 (Paul Craig & Grainne de Búrca eds., 2011).

traditionally been more reluctant. By excluding lower courts, Protocol no. 16 avoids the “explosion” of requests for advisory opinions sent to the ECtHR,<sup>69</sup> but, at the same time, limits the timing of the ECtHR’s intervention to the very end of the domestic judicial proceeding. Earlier ECtHR involvement would possibly have been more effective in terms of restoring violated rights.

Moreover, unlike in the EU preliminary reference procedure, under Protocol No. 16 the ECtHR retains the power to decide which requests it wants to address; it is not a matter of admissibility of the reference on procedural and factual grounds.<sup>70</sup> Rather, the ECtHR enjoys a discretion as to which opinions to issue.

The request lodged by a highest court is analyzed by a panel of five ECtHR judges, including *ex officio* the judge of the High Contracting Party from where the mechanism was activated and, if the request is accepted, then it is the Grand Chamber that delivers the opinion. If the request is denied, reasons must be given for the refusal by the panel and must, moreover, be made public.

Given the vague phrasing of Article 2 of Protocol No. 16, it is likely that the ECtHR will develop its own criteria to select cases. It has also been convincingly argued that because of the composition of the panels selecting the advisory opinions and deciding on referrals to the Grand Chamber, the same conditions will apply to both cases. This would mean that the request of a highest court would be accepted “if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance” (Article 43(2) ECHR).<sup>71</sup> Thus, selection would be oriented by the quality and significance of the issues to be addressed.

There are elements which lead one to foresee a mild scrutiny on those conditions, whereas others lead to the consideration that the ECtHR will set strict standards. On the one hand, if the primary objective of the advisory opinion mechanism is to strengthen the relationships between national courts and the ECtHR and to favor the correct interpretation and application of the ECHR, it would be reasonable to assume that the ECtHR would try to be as responsive as possible to the concerns of the highest courts, selecting the greatest number of opinions compatible with the sustainability of its workload. The new mechanism of Protocol No. 16, indeed, is designed to centralize

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<sup>69</sup> Kanstantsin Dzehtsiarou, *Interaction between the European Court of Human Rights and member states: European consensus, advisory opinions and the question of legitimacy*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS. TURNING CRITICISM INTO STRENGTH* 116–46 (Spyridon Flogaitis *et al.* eds., 2013).

<sup>70</sup> See the *acte clair* doctrine of the CJEU and the *CILFIT* case, Case C–283/81, Srl CILFIT e Lanificio di Gavardo SpA v. Ministero della sanità, 1982 E.C.R. 03415.

<sup>71</sup> See Gerards, *supra* note 53, at 644–45.

interpretation of the ECHR, with a central authority, the ECtHR, giving guidance to the “fellow courts”.<sup>72</sup>

This trend towards the centralization of interpretation is testified by the preliminary reference procedure and the CJEU, although devoid of a docket control. The CJEU has traditionally been very generous in declaring preliminary references admissible, starting from the definition of “any court or tribunal of a Member State” allowed to issue a preliminary reference (Article 267 TFEU). The limits posed to preliminary references through the CJEU case law, like the *CILFIT* case and the *acte clair* doctrine, are aimed only at balancing the need for a constant dialogue between national and supranational courts with a workload that could hinder the CJEU.

On the other hand, however, the ECtHR fulfills a different role to the CJEU, and indeed, when the discussion on Protocol no. 16 was still underway, the ECtHR judges expressed serious concerns about the idea of delivering advisory opinions also.<sup>73</sup> The ECtHR usually judges *in concreto*, on specific cases, and when deciding on a case it does not see interpretation as separate from application of the ECHR.<sup>74</sup> This makes the mechanism of Protocol No. 16 rather different from the EU preliminary ruling procedure.<sup>75</sup> It is thus unlikely that the ECtHR will decide to issue an opinion on a law *in abstracto*; at the same time, it will not deliver an advisory opinion on issues which are already at stake in a pending case (Article 47(2) ECHR), unless the case is completely new and the Court has never been asked to decide on the point in question before.

#### *IV. The Effects of the ECtHR Opinions and the CJEU Preliminary Judgments: A Similar “Threat” to the Autonomy of Constitutional Interpretation?*

In theory, the most apparent difference between the preliminary reference procedure and the advisory opinion mechanism consists in the effects of the intervention of the supranational court.<sup>76</sup> By case law and conventional interpretation of the EU treaties,

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<sup>72</sup> Whether this centralization will succeed is difficult to predict, but some hypotheses are advanced in Section II.E.

<sup>73</sup> See Zagrebelsky, *supra* note 65, at 93.

<sup>74</sup> As noted by Vladimiro Zagrebelsky, Protocol No. 16, Art. 1, unexpectedly talks about “interpretation or application” rather than interpretation *and* application.

<sup>75</sup> See Christos Giannopoulos, *Considerations on Protocol N°16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?*, 2 GERMAN L.J. 337, 345 (2015).

<sup>76</sup> See Roberto Conti, *La richiesta di parere consultivo alla Corte europea da parte delle Alte Corti introdotto dal Prot. 16 CEDU e il rinvio pregiudiziale alla Corte di Giustizia dell’Unione europea. Prove d’orchestra per una nomofilachia europea*, in LA RICHIESTA DI PARERI CONSULTIVI ALLA CORTE DI STRASBURGO DA PARTE DELLE PIÙ ALTE GIURISDIZIONI NAZIONALI, *supra* note 63, at 100–02; Giannopoulos, *supra* note 73, at 341–43.

which are silent on this point, these effects are binding and *erga omnes* for the CJEU case law,<sup>77</sup> whilst, according to Article 5 of Protocol No. 16, the advisory opinions are explicitly non-binding. It would follow that the national judicial authority issuing the request for an advisory opinion then has discretionary powers regarding the implementation of the ECtHR opinion, meaning that it could perhaps even be disregarded (Section B.III.1).

This notwithstanding, the Explanatory Report to the new Protocol states:

They [*the 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.<sup>78</sup>

Although the binding and *inter-partes* effects of final ECtHR judgments cannot be recognized in the new advisory opinions (Article 46(1) ECHR), the Explanatory Report emphasizes the importance of these opinions as part of the case law of the Court and, therefore, as being of comparable interpretative value to its judgments and decisions. Having force of *res interpretata*, the advisory opinions complement the ECHR and are thus expected to be complied with by national courts, parliaments, and administrations (and not only by the issuing authority).<sup>79</sup> The practical implications of these opinions, based on the Explanatory Report, could therefore be much more significant than the plain words of Article 5 let predict.

Whilst the reference in an advisory opinion to the interpretation of an ECHR right would, therefore, be binding, the concrete application and adaptation of that interpretation to the pending case would be for the national court to do. Thus, an advisory opinion would contain both a binding part and a part specifically addressed to the case at stake, and this latter would be merely a guide for the national judge. However, because of the link, highlighted in Article 1 of Protocol No. 16, between the advisory opinion and the pending

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<sup>77</sup> See Jan Komárek, *Federal elements in the Community judicial system: building coherence in the Community legal order*, 42 COMMON MKT. L. REV. 9, 10 (2005).

<sup>78</sup> See Explanatory Report at point 27.

<sup>79</sup> See Adam Bodnar, *Res interpretata: legal effect of the European Court of Human Rights judgments for other states than those which were party to the proceedings*, in HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21<sup>ST</sup> CENTURY, 223–62 (Yves Haeck & Eva Brems eds., 2014); Janneke Gerards, *The European Court of Human Rights and the national courts—giving shape to the notion of “shared responsibility”*, in IMPLEMENTATION OF THE ECHR AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE LAW. A COMPARATIVE ANALYSIS 21–27 (Janneke Gerards & Joseph W.A. Fleuren eds., 2014).

case, a clear-cut distinction between the general interpretation of an ECHR provision and its application to the case in the light of the criteria and standards set out by the ECtHR is very difficult to trace in practice. This, coupled with the authority of the opinion and the seriousness of the questions raised (see *supra* Section II.C), would make it almost impossible for the highest court requesting the advisory opinion not to follow it in resolving the case. Furthermore, given the general interpretative standards and principles established through them, advisory opinions could be deemed to have an impact comparable to an ECtHR pilot judgment, with *erga omnes* effects, rather than to an “ordinary” ECtHR judgment, with just *inter-partes* implications.

In practice, then, the difference between the preliminary reference procedure and the advisory opinion mechanism in terms of actual effects on domestic courts and national legal systems may dissolve.<sup>80</sup> Depending on the level of detail of the advisory opinions and on the potential use of the mechanism as a vehicle to anticipate subsequent case law development, advisory opinions, even if addressed to other highest courts, may be perceived by national Constitutional Courts as being a possible threat to their autonomy in constitutional interpretation. The same applied for many years—and still applies, today—with regards to preliminary rulings by the CJEU. Some commentators have considered, however, that advisory opinions might be rather vague in their content, because the ECtHR usually refrains from setting general principles, so as to reserve for itself a certain margin of manoeuvre for addressing subsequent cases.<sup>81</sup> By the same token, the Court might not be willing to use the possibility, expressly provided for by Protocol No. 16, to deliver separate opinions where no unanimous consent is reached, as has happened in the two cases of advisory opinions delivered to the Committee of Ministers. Should this be confirmed, the preference for delivering a single opinion would be likely to lead to a compromise solution among ECtHR judges, open to different interpretations.<sup>82</sup>

*V. Would Constitutional Courts be Willing to Engage in the Advisory Opinion Procedure?  
Drawing on the Experience of the Preliminary Reference Procedure in the EU*

What will make the advisory opinion procedure work is first of all a cooperative attitude by the parties involved: the ECtHR and national highest courts, and in particular the Constitutional Courts as the traditional watchdogs of fundamental rights in domestic constitutional systems in Europe. The centralizing trend in the interpretation of the ECHR

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<sup>80</sup> It has also been argued, on the EU side, that the level of follow-up on the CJEU preliminary rulings by national courts has been rather modest: see, for example, Michal Bobek, *Of feasibility and silent elephants: the legitimacy of the Court of Justice through the eyes of national courts*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED* 917–33 (Maurice Adams *et al.* eds., 2013).

<sup>81</sup> Zagrebelsky, *supra* note 65, at 96.

<sup>82</sup> *Id.* at 95.



and its protocols that may be detected as a consequence of the entry into force of Protocol no. 16 can only become a reality if and insofar as national courts activate the mechanism.

However, as has been widely acknowledged, the experience of the preliminary references before the CJEU testifies that Constitutional Courts in particular have not usually been willing to engage in such a “conversation.” This is despite the fact that, acting as courts of last resort, Constitutional Courts are obliged to refer questions of validity and interpretation of EU law that arise before them in order to solve a pending case. If these Courts have been reluctant in the presence of a precise obligation stemming from Article 267 TFEU, the hesitancy may be even stronger where, as in the case of the advisory opinion mechanism, such a duty does not exist.

Yet a direct “confrontation” between the ECtHR and Constitutional Courts is unavoidable as long as the object and the standard of review of conventionality and constitutionality at least partially overlap, or as long as they have to cope with the same challenges. This is reflected also in the shifting attitude of many Constitutional Courts towards the preliminary reference procedure in the EU in the aftermath of the Lisbon Treaty and the Euro-crisis. The codification of rights at EU level and eventually the entry into force of the Charter of Fundamental Rights has triggered a reaction by some reluctant Constitutional Courts (in Italy, France, and Spain, for example) that could no longer escape direct interaction with the CJEU, once that Court had officially become a competing authority for the determination of the level of protection of rights ensured at the domestic level (through the application of EU law). By the same token, a similar reaction by Constitutional Courts (in Germany and Slovenia, for instance) was triggered within national constitutional systems facing the stress of the financial crisis and the Euro-crisis law.

Likewise, in the implementation of the new advisory opinion procedure, Constitutional Courts can potentially be interested in establishing a long-standing “partnership” with the ECtHR, with the aim of ensuring the stability and predictability of the system of fundamental rights protection in Europe. The process of building up a relationship between Constitutional Courts and the ECtHR is the opposite of the one developed between Constitutional Courts and CJEU, although the final outcome, following Protocol No. 16, could be similar.

Within the framework of the ECHR, the national and supranational courts have always focused on the same issues in terms of the protection of rights, but they did not encroach upon each other’s competence until individual applications to the ECtHR were made possible in 1998. After Protocol No. 11 to the ECHR eventually entered into force, only a hidden dialogue between Constitutional Courts and the ECtHR was possible, as no device for their direct interaction was in force. Protocol No. 16 and the advisory opinions would fill this gap. By contrast, in the EU, the mechanism by which Constitutional Courts and the CJEU can interact directly—the preliminary reference procedure—has been in force since the very beginning of the process of European integration. However, until the 1970s, when

the CJEU became increasingly involved in the protection of fundamental rights, the supranational court and Constitutional Courts spoke different languages. This remains partly the case even today: the CJEU has usually spoken the language of the internal market, whereas Constitutional Courts have always been concerned with constitutional rights beyond economic freedoms.

Even without using the preliminary reference procedure, the CJEU and Constitutional Courts have been indirectly engaged in an intense conversation through their case law, which has shaped the whole process of European integration. What held most Constitutional Courts back from exploiting the preliminary reference tool until recently, despite the legal obligation arising from the treaties and the *erga omnes* effects, was the constraint provoked upon them by a direct and targeted preliminary ruling of the CJEU adopted upon their request.

For the same reason, Constitutional Courts could also feel uncomfortable with the advisory opinion mechanism, which, as has been argued, if activated would be more binding in terms of ECHR interpretation than one could expect, based on Article 5 of Protocol No. 16. Since, by contrast with the prescription of Article 267 TFEU, the request of advisory opinions is optional, in order to preserve its autonomy a Constitutional Court might be reluctant about submitting its case law on fundamental rights to the standards set by the ECtHR for the pending case. Constitutional Courts might strategically avoid requesting advisory opinions if they perceive those opinions as being not merely guidance, but as limiting their discretion to find the most suitable solution for the domestic jurisdiction.

*VI. National Constitutional Courts and the EU Accession to the ECHR: "Lost in the Application" of Protocol No. 16 and the EU Preliminary Reference Procedure*

To the complex picture of the relationship between the ECtHR and Constitutional Courts already laid out must be added a further element. How can the European system of fundamental rights litigation and the place of Constitutional Courts accommodate the new mechanism of the advisory opinions within the preliminary reference procedure?

This question is not merely hypothetical; it has been expressly invoked by the CJEU as a prospective issue of incompatibility between the draft accession agreement of the EU to the ECHR and EU law.<sup>83</sup> When Protocol No. 16 was signed, on 2 October 2013, the draft agreement had already been finalized. Yet the CJEU detected a potential threat arising from the advisory opinion procedure for the autonomy of EU law,<sup>84</sup> in particular for what

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<sup>83</sup> See Opinion 2/13, paras. 197-199 (Dec. 18, 2014), <http://curia.europa.eu/>.

<sup>84</sup> See, e.g., Daniel Halberstam, *It's the Autonomy, Stupid!* A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, 16 GERMAN L. J. 10546 (2015); Johan Callewaert, *Protocol 16 and the Autonomy of EU Law: Who Is Threatening Whom?*, EUROPEAN LAW BLOG, 3 October 2014, available at <http://europeanlawblog.eu/?p=2551>.

has been described as “the keystone of the judicial system established by the Treaties” (§ 176 Opinion): the preliminary reference procedure.<sup>85</sup> It is especially the lack of coordination between these two mechanisms when Constitutions, the Charter, and the ECHR overlap on the protection of a certain right that creates concerns in the Opinion of the CJEU. The CJEU focused its reasoning here only on the CJEU and the ECtHR, as if Constitutional Courts or national judges carrying out constitutional review of legislation were not at stake in this “dangerous twist” for the protection of fundamental rights in Europe.

The CJEU argued that the main mechanism which has protected the autonomy of EU law—the preliminary reference procedure—would be jeopardized if the same judges (i.e., the national highest courts and tribunals, which under EU law are obliged to issue a preliminary reference whenever a question of interpretation or validity is raised) firstly involved the ECtHR through a request for an advisory opinion. This would occur, in particular, when a highest domestic court had doubts about the compliance of EU norms or national measures implementing EU law with the ECHR. The risk, in the Opinion of the CJEU, is the circumvention of the Article 267 TFEU procedure.

According to the CJEU, when the protection of a right equally concerns the EU Charter and the ECHR, national courts of last instance might find it more convenient to resort to the advisory opinion procedure in combination with the activation by the ECtHR of a mechanism that is devised by the draft accession agreement—the “prior involvement” of the CJEU itself by the ECtHR. This could happen when an indirect action against EU law for the violation of an ECHR right is brought before a national court of last resort, which might then decide not to issue a preliminary reference to the CJEU, but rather a request for an advisory opinion from the ECtHR. EU law would then be interpreted without the CJEU. The prior involvement mechanism allows the ECtHR only to consult the CJEU before a decision affecting EU law (and its autonomy) is taken.

In Opinion 2/13, the CJEU considered the combination of a request for an advisory opinion and the prior involvement mechanism to have the potential to structurally undermine the use of the (direct) preliminary reference procedure. In this case, the usual “blindness” of the supranational courts towards the peculiar and essential role of Constitutional Courts in Europe was also confirmed.<sup>86</sup> Indeed, on the one hand, the problem about the order of precedence among different types of referrals replicates the complex dynamic already in place between preliminary references of constitutionality to Constitutional Courts and preliminary references under EU law. On the other hand, in Opinion 2/13 the CJEU

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<sup>85</sup> Adam Lazowski & Ramses A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GERMAN L. J. 179, 188 (2015).

<sup>86</sup> With reference to Constitutional Courts in the EU, see Jan Komárek, *National constitutional courts in the European constitutional democracy*, 3 INT’L J. CONST. L. 525–44 (2014).

oversimplified the reality by raising the issue of the bilateral relationship between the ECtHR and itself when a right is protected to a different extent by the Charter and the ECHR. However, Constitutions are also competing sources of authority for the protection of fundamental rights and so are their Courts, which are inserted into a network of relationships starting from those with the respective domestic supreme courts. In a system of fundamental rights protection resulting from the process of EU accession to the ECHR and from Protocol No. 16, and designed through these intertwined—although not fully coordinated—national and supranational courts, the main aim for which this complex architecture is in place is often overlooked. In other words, in an attempt to codify the procedures and to claim the precedence of a preliminary referral (constitutional, European, or conventional) over the others, according to “top down” mechanisms, it is possible to lose sight of the protection of fundamental rights, with too many “Constitutional Courts,”<sup>87</sup> domestic, European, and conventional, pretending to be judge in their own cause and to have the last word.<sup>88</sup>

The standpoint of national Constitutional Courts in the application of these mechanisms cannot be neglected, as they represent the main point of mediation between the enforcement of EU law and the ECtHR with domestic Constitutions, especially when a direct conflict arises between the level of protection accorded to a fundamental right under national constitutional law *vis-à-vis* the ECHR and/or the EU Charter. Given their proximity to citizens, national Constitutional Courts are best placed to accommodate supranational norms and case law within their domestic jurisdictions, while preserving, at the same time, a suitable degree of national constitutional ownership.

#### **D. How to Fix the Problems Deriving From the Advisory Opinions in the ECHR System? Lessons from the Advisory Opinions Within the ICHR System**

##### *1. The Inter-American Court of Human Rights as a Model*

After two years, Protocol No. 16 has not yet entered into force. There has been much commentary and discussion in the legal scholarship on the functioning of the advisory opinion system within the ECHR, underlining the strengths but also the weaknesses, as clearly shown in the analysis provided in Sections B and C. In particular, one of the most criticized aspects is that apparently Protocol No. 16 would not be able to reach the goals for which it was designed, due to, on one side, the uncertainty surrounding the

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<sup>87</sup> On the ECtHR and the CJEU as “Constitutional Courts” in their respective domains, see Steven Greer & Luzius Wildhaber, *Revisiting the Debate about “Constitutionalising” the European Court of Human Rights*, 12 HUMAN RIGHTS L. REV. 655, 668–70 (2012); BARBARA RANDAZZO, GIUSTIZIA COSTITUZIONALE SOVRANAZIONALE. LA CORTE EUROPEA DEI DIRITTI DELL’UOMO 4–10 (2012); Bo Vesterdorf, *A constitutional court for the EU?*, 4 INT’L J. CONST. L. 607–17 (2006).

<sup>88</sup> Aida Torres Pérez, *Too many voices? The prior involvement of the Court of Justice of the European Union*, 4 EUR. J. HUMAN RIGHTS 565, 583 (2013).

harmonization of the advisory function with the contentious function (as demonstrated by the experience of the ICHR), and, on the other side, the real utility of the Protocol as an instrument capable of strengthening the judicial dialogue in Europe (see Section B).<sup>89</sup>

These critical aspects have also all appeared in the Inter-American system. The Inter-American Court of Human Rights (hereafter, the ICHR) has dealt with these issues in a very developed and advanced body of jurisprudence, and it is useful to look at this in order to speculate on the possible evolutions of the advisory mechanism in the European context.

With this question of anticipating how the advisory mechanism might function being the main purpose, we will firstly analyze the main structural characteristics of the advisory opinion within the ICHR (the relevant norms and the case law developed by the Court in the light of the elements of the ICHR system) (I), before focusing, secondly, on the relationship between its consultative function and its adjudicatory function (II), and, finally, on the dialogue between the ICHR and States (III).

## *II. The Structural Features of the Advisory Opinions in the ICHR*

In 1985, the Vice-President of the ICHR, Thomas Buergenthal, wrote, “[t]he role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction.”<sup>90</sup> Being an “autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights” (as established in Article 1 of its Statute), the ICHR exercises its jurisdictional function through two modalities: the adjudicatory function and the advisory function.

The ICHR advisory function, defined as “multilateral rather than litigious”,<sup>91</sup> has been enriched by the Court itself, taking as a starting point Article 64 of the American Convention.<sup>92</sup>

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<sup>89</sup> See Pasquale De Sena, *Caratteri e prospettive del Protocollo 16 nel prisma dell’esperienza del sistema interamericano di protezione dei diritti dell’uomo*, 8 DIRITTI UMANI E DIRITTO INTERNAZIONALE 593–606 (2014).

<sup>90</sup> See Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L L. 1 (1985).

<sup>91</sup> See I/A Court H.R., *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*, Advisory Opinion OC–15/97 of 14 November 1997. Series A, No.15, para. 26, according to which it is evident that the State or organ requesting an advisory opinion is not the only one with a legitimate interest in the outcome of the procedure, whose very purpose is the protection of human rights.

<sup>92</sup> The advisory function, besides complementing the ICHR adjudicatory competence, also complements the competences of the Inter-American Commission of Human Rights, as indicated in the Charter of the Organization of American States (Art. 106) and in the American Convention of Human Rights (from Arts. 34 to 51).

### 1. Subjects

According to this provision, all Member States of the Organization of American States (hereafter, the OAS), whether or not they have ratified the Convention, may consult the Court. All the organs of the Organization (organs listed in Chapter X of the OAS Charter) may also consult the Court, but their competence is limited because they can only consult the Court within their sphere of competence.<sup>93</sup> Even if the Inter-American Commission is one of the organs listed in Chapter X of the OAS Charter, the Court has recognized its absolute right to consult the Court, given the Commission's broad powers relating to the promotion and observance of human rights as established in Article 112 of the OAS Charter.<sup>94</sup> However, this absolute right does not extend the Commission competence to address a request to the Court according to Article 64(2) (see below).<sup>95</sup>

Organs indicated in Article 64 may also participate in the proceeding, despite the fact that neither the Statute of the ICHR<sup>96</sup> nor the 1980 Rule of the Court provide for *amicus curiae*. This is because since its very first advisory opinion the Court allowed national and

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<sup>93</sup> The expression "within their sphere of competence" has been interpreted by the Court with a "legitimate institutional interest" by the requesting organ in the questions posed in the request. See I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982. Series A, No. 2, para. 14, according to which, even if initially each organ decides whether the request falls within its sphere of competence, the Court has the ultimate word in determining compliance with this requisite by reference to the OAS Charter and the constitutive instrument and legal practice of the particular organ. See also BERTHA SANTOSCOY-NORO, *LE SYSTEME INTERAMERICAIN DE PROTECTION DES DROITS DE L'HOMME, EN INSTITUT INTERNATIONAL DES DROITS DE L'HOMME* (1996).

<sup>94</sup> See *The Effect of Reservations on the Entry into Force*, *supra* note 91, at para 16. See also I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of September 8, 1983. Series A, No. 3 OC 3/1983, para. 42.

<sup>95</sup> See I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A, no.14, paras. 24–26, in which the Court excluded the possibility for the Commission to request an advisory opinion on a proposed amendment to the Constitution of Peru, which would have expanded the number of cases for which the death penalty could have applied, because the Commission was not requesting a statement as to the compatibility of that provision of Peru's domestic law with the abovementioned provision of the Convention. On the contrary, the questions posed by the Commission made no reference to that provision, being general in nature and concerning the obligations and responsibilities of the states or individuals that promulgate or enforce a law manifestly in violation of the Convention.

<sup>96</sup> Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No. 448).

international organizations to take part in the procedure,<sup>97</sup> later extending this possibility also to individuals and non-organized groups.<sup>98</sup>

## 2. Object

According to the text of Article 64, two different types of advisory opinions are recognized, establishing in general a very wide competence (far wider than the advisory function provided by Protocol No. 16).

### *a) The Interpretation of the Convention and of Other International Treaties Concerning the Protection of Human Rights*

As a matter of fact, according to Article 64(1), the Court may be consulted regarding the interpretation not only of the American Convention, but also of other treaties concerning the protection of human rights in the American states. Whilst identification of the Convention is absolutely clear, the definition of the “other treaties concerning human rights” has been the subject of interpretation by the Court since its first advisory opinion.<sup>99</sup>

According to the ICHR, Article 64 confers “the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the Inter-American system”.<sup>100</sup> Thus, it is not necessary that the “treaty” has been adopted within the Inter-American system or that it is a “treaty” to which only American states are parties. The Convention does not distinguish between multilateral and bilateral treaties or between treaties whose main purpose is the protection of human rights and those treaties, which, though they may have some other principal object, contain provisions regarding human rights.<sup>101</sup>

Thus, in its advisory function the Court may interpret any treaty on the protection of human rights valid in any of the States of the OAS, even when they have not ratified the American Convention. It is not even important whether this treaty has been conceived

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<sup>97</sup> See I/A Court H.R., “Other treaties” subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 5.

<sup>98</sup> In the 2009 reform of the Rules of the Court, *amicus curiae* was expressly included for adjudicatory proceedings, while for advisory proceedings the Court may authorize any person to give its opinion on the consultation.

<sup>99</sup> The Court was asked by the Government of Peru to interpret the phrase “or of other treaties concerning the protection of human rights in the ‘American States.’” Cf. “Other Treaties,” *supra* note 95.

<sup>100</sup> *Id.* at para. 21.

<sup>101</sup> *Id.* at para. 21. See PEDRO NIKKEN, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI (2003); Buergenthal, *supra* note 90.

within the framework of the Inter-American system or whether it involves one or more non-American States.<sup>102</sup> Consequently, the Court has interpreted international treaties like the Convention on the Rights of the Child<sup>103</sup> and the 1963 Vienna Convention on Consular Relations.<sup>104</sup>

Moreover, in interpreting the word “treaty”, as indicated in Article 64, the Court has stated that it must include other documents too, even if these are non-binding and even if they have not been concluded following the formalities required for treaties. In this context, it has recognized the possibility of pronouncing an advisory opinion on the text of the 1948 American Declaration of the Rights and Duties of Man, based mainly on the idea that Member States of the OAS have agreed that the Declaration contains and defines the fundamental human rights referred to in the Charter of the Organization itself, which cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.<sup>105</sup>

Finally, the ICHR extended its advisory competence in interpreting the Convention or other treaties concerning the protection of human rights to reservations attached to those instruments, based on the idea that reservations are a part of the treaty itself.<sup>106</sup>

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<sup>102</sup> One of the objections posed to the extension of the limits of the Court's advisory jurisdiction is the possibility of conflicting interpretations between the Court and other organs outside the Inter-American system that might be called upon also to apply and interpret treaties concluded outside that system. Considering that this is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated, the Court considered that even a restrictive interpretation of Art. 64 would not avoid the possibility that this type of conflict might arise. See *Other Treaties*, *supra* note 95, at para. 50.

<sup>103</sup> See I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC–17/02 of August 28, 2002. Series A, No.17; I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC–21/14 of 19 August 2014.

<sup>104</sup> Even if at first glance the Vienna Convention on Consular Relations is not a treaty on human rights, it does contain important provisions on the right to information on consular notification (under Art. 36(1)(b)). The concurrent opinion of Judge Cançado Trindade is fundamental in recognizing that this Convention can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law. See I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC–16/99 of 1 October 1999. Series A no.16.

<sup>105</sup> See I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC–10/89 of 14 July 1989. Series A, no.10OC 10/1989, paras. 43 and 48.

<sup>106</sup> According to the Court, the effect of a reservation, as provided in the Vienna Convention, is to modify with regard to the State making it the provisions of the treaty to which the reservation refers. See *Restrictions to the Death Penalty*, *supra* note 94, at para. 45.



*b) The Interpretation of National Laws*

According to Article 64(2), Member States of the Organization can activate the advisory function of the Court by requesting opinions regarding the compatibility of any of their domestic laws with the international instruments mentioned in Article 64(1). All OAS Member States—and not only those party to the Convention—can consult the Court to determine whether provisions of their domestic laws conform to the obligations they assumed in the Convention or in other human rights treaties.

The Court has clarified that the expression “domestic law” includes legislative or constitutional drafts.<sup>107</sup> This is because the purpose of the ICHR advisory function is to assist OAS Member States and organs in complying with their international human rights obligations, and also to avoid the contentious legal process and all related sanctions. This purpose would be frustrated if the Court could emit a decision on State legislation only once the law entered into force. However, the Court can decide whether to admit or to reject advisory opinion requests regarding legislative proposals, and, in doing so, it has to bear in mind that its main purpose is to assist the requesting state in better complying with its international human rights obligations. As a matter of fact, the Court will reject a request in all those cases in which it would become embroiled in domestic political squabbles, which could affect the role assigned to it by the Convention.

*3. The Effects of the Decisions*

The extensive interpretation developed by the ICHR and the progressive extension of its material competence, as well as of the subjects legitimated to activate the procedure, are the consequences of the principal and unique purpose of the advisory function itself: the interpretation of the American Convention and of other treaties concerning the protection of human rights in the American States. The extensive advisory jurisdiction conferred on the Court by Article 64 of the Convention and by its judicial interpretation is unique in contemporary international law. The advisory opinion system has created a parallel system to the adjudicatory power of the Court by offering an alternative judicial method with consultative nature. Its aim is to assist states and organs in applying and complying with human rights treaties, without subjecting them to the formalism and the sanctions associated with the contentious judicial process.<sup>108</sup> These considerations are fundamental in order to clarify the framework as to the effects of advisory opinions. This is also important because, from the effects of decisions, some considerations can be drawn

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<sup>107</sup> See I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984. Series A, no. 4, on the request presented by the Government of Costa Rica of an advisory opinion on the compatibility of a constitutional reform of Articles 14 and 15 of its Constitution. *See id.* at para. 26.

<sup>108</sup> *See Restrictions to the Death Penalty, supra* note 93, at para. 43.

regarding the relationship between adjudicatory and advisory functions and regarding the judicial dialogue in the Inter-American context.

The foregoing considerations imply that, for the Court, advisory opinions do not have the same binding effect as adversarial decisions. However, they do have undeniable juridical effects, and consequently the requesting State or organ is not the only party interested in the result of the proceeding. For if a State carries out activities that the ICHR, through an advisory opinion, has determined as incompatible with the American Convention, that State can no longer claim to be unaware that its behavior is violating its obligations under the Convention.<sup>109</sup>

Considering the main philosophy behind the advisory function—“assisting the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field”<sup>110</sup>—the Court has a discretionary, but not arbitrary, power to comply with a request. It can refuse every time a request for an advisory opinion has another purpose that would weaken the system established by the Convention and that would distort the advisory jurisdiction of the Court in a manner that would impair the rights of potential victims of human rights violations.<sup>111</sup>

The legal scholarship dealing with the effects of advisory opinions is not unanimous. Part of it considers that the Court exercises the function, both at the adversarial and advisory levels, of applying and/or interpreting the American Convention, thereby functioning as a jurisdictional body and, as such, making jurisdictional decisions. According to this scholarship, these decisions should be considered as case law, and an auxiliary source of law in international law according to the provisions of Articles 38-59 of the Statute of the International Court of Justice. Indeed, this approach is supported by the fact that many advisory opinions have been invoked in contentious cases.<sup>112</sup>

Nonetheless, it is also true that Article 2 of the Court’s Statute distinguishes between its jurisdictional function and its advisory function. However, part of the legal scholarship considers that in this case the term “jurisdiction” has been used as a synonym for “contentious.”<sup>113</sup>

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<sup>109</sup> See JORGE ERNESTO ROA, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 96 (2015).

<sup>110</sup> See *Other Treaties*, *supra* note 95, at para. 25.

<sup>111</sup> *Id.* at para. 31.

<sup>112</sup> See NIKKEN, *supra* note 101.

<sup>113</sup> *Id.* at 171.

Meanwhile, another strand of legal scholarship,<sup>114</sup> which is based on the Court's expressions according to which in the exercise of its advisory function the Court fulfills a consultative function through opinions, considers that they "lack the same binding force that attaches to decisions in contentious cases."<sup>115</sup>

### *III. The Relationship Between the Advisory and the Adjudicatory Jurisdiction*

One of the most delicate aspects that demands the attention of scholars studying the possible problems of Protocol 16 is the relationship between the advisory and the adjudicatory function. It is necessary to seek a harmonization between the two functions. The following parts of the article set out some considerations as to how the ICHR has dealt with the issue.

#### *1. The Use of Advisory Opinions to Inform Decisions on Contentious Cases, as Interpretative Criteria*

In at least twenty adjudicatory cases, the Court has applied arguments taken from advisory opinions as part of the interpretative process in contentious cases. It remains unclear whether the Court does so because it feels bound/obliged to refer to its case law or whether it only does so on a discretionary basis. Under the first approach, the Court would define the effects of the advisory opinion throughout its interpretation. On one side, advisory opinions would be considered as binding on all states, thereby representing a horizontal precedent that could be used in contentious cases. On the other side, the Court would not consider its advisory opinions to be binding, except when "transposed" in a decision in an adjudicatory case. Under the latter approach, advisory opinions would only represent subsidiary interpretative criteria, with an opinion only being converted to international jurisprudence when the Court uses it as a basis for its decision in an adjudicatory case. This approach would be problematic, because from the point of view of States' international responsibility it would mean recognizing that in all those cases in which the Court based a decision in favor or against a State on an advisory opinion, it would be applying interpretative criteria that really are not binding on any State. Any declaration of State responsibility would stand outside the international obligations of the State itself, with the subsequent violation of the rights of victims.

If advisory opinions are considered to simply be part of the argumentative process developed by the Court, then they cannot be considered binding. The latter hypothesis appears to be the most consistent, but it is probably less tied to reality, because in fact the

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<sup>114</sup> See HÉCTOR FAÚNDEZ LEDEZMA, *EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES* 450–54 (1996).

<sup>115</sup> See *Other Treaties*, *supra* note 95, at para. 51.

Court usually directly quotes advisory opinions when adopting certain decisions in a proceeding.

### 2. *The Use of Adjudicatory Jurisprudence in Advisory Opinions*

If the Court uses the precedents pronounced in contentious cases in advisory opinions as part of the decision, it would have the same consequences as we have already mentioned with reference to the effects of an advisory opinion. The most complicated situation is when the Court develops, in an advisory opinion, jurisprudence that has been established in a contentious case, which happened in the advisory opinion on "*Juridical Condition and Human Rights of the Child*."<sup>116</sup> In this opinion, the Court not only defined the juridical status and children's human rights in accordance with international standards, but referred to the case *Niños de la Calle (Villagrán Morales y otros) v. Guatemala*<sup>117</sup> to support the development of rights to equality, education, and judicial guarantees for children. The Court increased the standard of protection of their rights and imposed new obligations on States. It might be thought that in these cases in which the interpretative principle affirmed in an advisory opinion derives from the development of a binding precedent, that standard is not made mandatory.

In particular, the Court's extension of its advisory jurisdiction does not imply that it is possible to a State that is not part of the Convention a standard that is nothing else but the development of an interpretation of an international treaty that is binding for the requesting State. It would be possible to apply this standard given the *pro persona* principle in human rights interpretation, but not for a direct application of the advisory opinion in which it was provided.<sup>118</sup>

### 3. *The Case of States That Have Not Accepted the Court's Jurisdiction*

In this context, we can consider two different options.

(1) The case in which the Court is asked to render an advisory opinion on a dispute that could not be referred to the Court under the adjudicatory function because one of the States had not accepted its contentious jurisdiction;

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<sup>116</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of 28 August 2002, Series A, no.17.

<sup>117</sup> I/A Court H.R., *Case of the "Street Children" (Villagrán Morales and others) v. Guatemala*, Decision of 19 November 1999, Series C No. 63.

<sup>118</sup> See ROA, *supra* note 109.

(2) The case in which the Commission, in the absence of a State's consent to the Court's jurisdiction, seeks an advisory opinion under Article 64(1), being unable to refer the case to the Court under the contentious jurisdiction.

As was mentioned above, the ICHR has recognized the absolute right of the Inter-American Commission to consult the Court. According to the powers and obligations conferred upon the Commission by the Convention, it is necessary and appropriate that it consult the Court regarding the meaning of certain provisions, whether or not there exists an interpretative difference between a State position and that of the Commission. The Court has considered that only cases in which the advisory opinion request might interfere with the proper functioning of the system of protection spelled out in the Convention, or if it might adversely affect the interests of the victim of human rights violations, would not be admitted.<sup>119</sup>

#### IV. *The Dialogue*

In the Inter-American context, the "dialogue" follows two main directions: judicial and intergovernmental.<sup>120</sup> As seen in the previous paragraphs, advisory opinions are generally not legally binding. However, legal scholarship, Member States, and the Court itself tend to recognize them at least at the interpretative level, and many judges have used advisory opinions as interpretative arguments.<sup>121</sup>

However, as will be indicated below, even if State behavior has not been unanimous, the "dialogue" with the States has been quite complicated, for several reasons. First, standards of protection elaborated in advisory opinions are not binding on Member States. This is

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<sup>119</sup> See *Other Treaties*, *supra* note 95. Another limit is represented by all those cases in which the advisory opinion of the Court could produce a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings. Such a result would distort the Convention system. Cf. I/A Court H.R., *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991. Series A, no.12, para. 28.

<sup>120</sup> It is necessary to underline that "judicial dialogue" within the Inter-American system has been better realized through conventionality control and consistent interpretation. See Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, 2 ESTUDIOS CONSTITUCIONALES 531-622 (2011).

<sup>121</sup> In this sense, for example, the Supreme Court of Argentina in the case *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.* case no. 17.768, decision of 14 June 2005, declared the unconstitutionality of two amnesty laws (Law no. 23.492 and Law no. 23.521). For several reasons, but with an explicit reference to the advisory opinion on *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, considered as part of the Convention case law. More specifically, this opinion underlined, with direct reference to the Convention, the general principle according to which all state organs have to comply with State international obligations. The supreme judge of Argentina invoked this principle in order to inhibit human rights violations committed during the military dictatorship. See De Sena, *supra* note 89; ROA, *supra* note 109, at 130 on the application of the ICHR advisory opinion in the Constitutional Court of Colombia case law.

due to legal conditions, but also to the extension and indeterminacy of the ICHR's competence. Member States cannot find in advisory opinions a general source of legal obligation, as in the case of contentious decisions, partly because the Court cannot pronounce on State responsibility.

Whilst it is true that American States, which are also part of the Convention system, have, in the great majority of cases, respected advisory opinions, human rights protection implies a higher and greater level of commitment.

It is important to underline that, in the latest advisory opinion, "*Rights and guarantees of children in the context of migration and/or in need of international protection*,"<sup>122</sup> the ICHR stated that the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, *it can provide guidance* when deciding matters relating to children in the context of migration and to avoid possible human rights violations. Similarly, the Court found it necessary to recall that, pursuant to international law, when a State is party to an international treaty, such as the American Convention on Human Rights, such a treaty is binding on all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercising its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the Inter-American human rights system, which is "the protection of the fundamental rights of the human being."<sup>123</sup>

Thus, advisory opinions are considered as a binding parameter for national authorities. From now on, ignoring an advisory interpretation and implementing or maintaining the validity of a law contrary to the interpretation set out in the advisory opinion, could generate the international responsibility of the State before the Inter-American Court.

Although progress in determining the effects of advisory opinions has been attained, there remains a contradiction between, on one side, the increasingly clear binding force of advisory opinions and, on the other side, the Court's attitude of continuing to differentiate, in this aspect, the effects of advisory opinions and the judgments in contentious cases.

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<sup>122</sup> See *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra* note 103.

<sup>123</sup> *Id.* at para. 31.

However, it is still difficult to explain the differences between the effects of an advisory opinion and those of a contentious decision, beyond the intrinsic characteristics of each of the procedures. Moreover, the Court has advanced a strange understanding of its advisory function, because the ICHR is not a higher court with the power to revoke lower court sentences, ignoring its own precedents, and it is not even possible to talk about the value of a precedent on a horizontal level.<sup>124</sup>

Finally, in exercising the advisory function, the Court can perform a compatibility control between norms in force (constitutional and legal) or legislative drafts (constitutional or legal) of States. The control of compatibility of existing rules of States with the American Convention is analogous to the abstract and posterior control of constitutionality and the control of compatibility of constitutional or legislative drafts is analogous to prior judicial review. However, caution is needed here because, as has been underlined, the analogy between the Inter-American Court and Constitutional Courts is limited since the Inter-American Court cannot invalidate provisions contrary to the Inter-American *corpus iuris*.<sup>125</sup>

#### E. Final Remarks

If Protocol No. 16 becomes effective, the ECHR system will be aligned with most of the supranational human rights organizations, providing for not only contentious, but also advisory, jurisdiction.

However, because of the interaction with the existing mechanisms for the protection of fundamental rights at the domestic as well as European levels, the effects of the protocol might become much wider than its drafters imagined. This could result not only in the expansion of the culture of “European rights,” but also in some shortcomings. In particular, the ECHR system could suffer asymmetries, considering not only the state of ratifications, but also the discretion left to national authorities in selecting the courts authorized to refer. Moreover, the new mechanism could have an effect on the existing balance between ordinary and Constitutional Courts in fundamental rights adjudication in Europe, with the risk of creating conflicts that, in the end, result in a decline in the level of protection of the rights of individuals.

Protocol No. 16 could trigger an ECtHR-based centralization of interpretation and, indirectly, of application of ECHR rights, while leaving a narrow margin of manoeuvre to national, and in particular constitutional, judges, in the interpretation of those rights based

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<sup>124</sup>AUGUSTO GUEVARA PALACIOS, LOS DICTÁMENES CONSULTIVOS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS. INTERPRETACIÓN CONSTITUCIONAL Y CONVENCIONAL 321–22 (2012).

<sup>125</sup> See Laurence Burgogme-Larsen, *La Corte Interamericana de Derechos Humanos como Tribunal Constitucional*, in IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 412–57 (Héctor Fix Fierro, Mariela Morales Antoniazzi & Armin von Bogdandy eds., 2014).

on national constitutional provisions. Hence, a reluctance in using the advisory opinion mechanism on the part of Constitutional Courts could be foreseeable—a reluctance, perhaps, comparable to that witnessed for many years of Constitutional Courts failing to fulfill their duty to use the preliminary reference procedure before the CJEU. By contrast, if the ECtHR interprets its power of docket control strictly, then the impact of the overall mechanism on its relationship with highest courts will be almost non-existent. Indeed, the text of the Protocol is left deliberately vague.

All in all, however, the advisory opinion mechanism in principle has the merit of allowing Constitutional Courts to engage in the protection of fundamental rights actively in coordination with the ECtHR, whereas heretofore such a direct link was lacking. In other words, it is for the Constitutional Courts to decide whether, in the framework of the ECHR system, they want to be mere recipients of the interpretation of fundamental rights provided by the ECtHR or also agents of fundamental rights in Europe.<sup>126</sup> The latest developments in terms of preliminary references to the CJEU by Constitutional Courts, which involve an increase in both the number of references and in the number of courts involved, show that, even where the cooperation with the CJEU is mandatory according to the EU treaties (and contrary to Protocol No. 16), in practice and despite the obligation, Constitutional Courts have eventually decided when to use Article 267 TFEU.

As the experience of the ICHR demonstrates, a cooperative attitude of courts could help in avoiding the possible shortcomings identified in the mechanism of Protocol No. 16. Favorable legislation and a supportive environment have been the ingredients that have allowed the Inter-American system to enjoy quite a wide consultative function,<sup>127</sup> insofar as the *locus standi* before the Court is concerned, as well as the number and type of subjects on which advisory opinions from the Court may be requested, the object (i.e., the texts on which the opinion may be requested), and the effects of the decision. Furthermore, through the advisory opinion function, the ICHR has developed a *pro-persona* interpretation, elaborating solid and advanced juridical conceptions directed at reinforcing its advisory competence.<sup>128</sup> However, some weaknesses have also emerged

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<sup>126</sup> See Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this *Special Issue*.

<sup>127</sup> In the practice of the Inter-American Court, the adoption of advisory opinions has developed considerably especially in the first phase of the life of the Court, primarily due to the reluctance of States to submit to the ICHR's adversarial jurisdiction. In fact, in the period of 1982–1989, the Court has issued its first ten advisory opinions or nearly half of those issued to date (total of twenty-one): two in 1982, one in 1983, one in 1984, one in 1985, two in 1986, two in 1987, and one in 1989. The same trend has been repeated in the early nineties (1990–1994), when the exercise of the adversarial jurisdiction was still very sporadic.

<sup>128</sup> In this sense, see *Other Treaties*, *supra* note 95, at para. 17, according to which with reference to Art. 64 “This text, which was broader than any similar contemporary international provision.” See also Fabian Salvioli, *La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarrollo jurisprudencial*, in *HOMENAJE Y RECONOCIMIENTO A ANTÔNIO CANÇADO TRINDADE*, T. III, 417–72 (S. Fabris eds., 2004).



within the Inter-American system, which mainly stem from the uncertainty of the effects of the decisions. At the same time, the activism of the ICHR with regard to the expansion of its advisory competence has generated the following consequences: it questions the international legality of obligations the Court may impose on States in those contentious judgments constructed on arguments expressed in the advisory opinion and it makes the practice of the Court to use arguments of contentious sources in advisory opinions somewhat confusing. Generally speaking, the highest courts of several Latin American countries—which, due to the characteristics of the prevalent model of constitutional justice in that area, have also to deal with constitutional review of legislation, thereby reflecting the U.S. model—have assumed a positive conduct.<sup>129</sup> The result is a dynamic interaction and a gradual reinterpretation of domestic law, without introducing a formal change.

Finally, the success of the mechanism introduced by Protocol No. 16 will depend on the elements analyzed in this article and concerning both the prospective attitude of Constitutional Courts and of the ECtHR as well as the prospective contents of its advisory opinions.

Likewise, the development of the triangular relationship between the CJEU, ECtHR, and Constitutional Courts needs to be explored in the light of Protocol No. 16 and EU accession to the ECHR, if and when it is achieved. From the point of view of Constitutional Courts, EU accession to the ECHR may further complicate the functioning of Protocol No. 16, as it would open up competing channels of communication, first of all with the EU preliminary reference, between national and supranational courts.

As has been pointed out, the complex intertwining of the new advisory opinion mechanism of the ECtHR and the preliminary reference procedure before the CJEU shows that there is a missing piece in this jigsaw. These mechanisms devise inter-judicial relationships that rely only upon the inputs of domestic courts, as if the CJEU and the ECtHR, in their respective domains, do not need to engage in the first place in a “conversation” with national judges,

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<sup>129</sup> This positive approach is resumed in the approach of the Constitutional Court of Peru, according to which it has referred to the ICHR as the “ultimate guardian of rights in the region,” underlining the necessity to take into consideration its interpretation. See Constitutional Court of Peru, 17 April 2002, Cartagena Vargas, no. 218-02-HC/TC, para. 2. The Constitutional Court of Peru considers that ICHR judgments—including advisory opinions—are binding for all public authorities, binding nature that “is not exhausted by its operative paragraphs, but extends to the *ratio decidendi*, even in those cases in which the Peruvian State has not been a party to the proceedings.” *Id.* at para. 36. On the same line is the Constitutional Court of Colombia. See Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 7 Tx. L. Rev. 1835–62 (2011). For a “negative approach” in the experiences of Argentina, Chile, and Venezuela, see Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 112–39 (Javier A. Couso, Alexandra Huneeus, & Rachel Sieder eds., 2013).

and particularly with Constitutional Courts.<sup>130</sup> Without the CJEU and the ECtHR being able to take steps forward towards constitutional judges, some of their decisions risk being detached from the constitutional systems from where the case arose, or risk exclusively focusing on the protection of a right without taking other competing public interests seriously (for example, in cases having an impact on welfare systems, still financed almost entirely by States, and on national budgets).<sup>131</sup> Hence, the establishment of a system of reverse referrals from the CJEU and the ECtHR, respectively, to Constitutional Courts, would perhaps appear appropriate. This could be used when doubts arise about the constitutional implications of a prospective EU or conventional judgment at the domestic level, especially when constitutional judges have had the opportunity to have a say on the pending case.<sup>132</sup> This way, the declared objective of Protocol no. 16, which is to strengthen the cooperation between highest domestic courts and the ECtHR, would be truly fulfilled, through the putting in place of a bi-directional relationship.

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<sup>130</sup> See Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this *Special Issue*.

<sup>131</sup> See, e.g., in matter of pensions, the case *Da Conceição Mateus v. Portugal*, App. Nos. 62235/12 and 57725/12, (Oct. 8, 2013), <http://hudoc.echr.coe.int/>, which took a different view to the Portuguese Constitutional Court in Decision no. 353/2012. By contrast, in Decision no. 264/2012, the Italian Constitutional Court, again on pensions, decided not to follow the judgment rendered on the same issue by the ECtHR in *Maggio and others v. Italy*, App. Nos. 46286/09, 52851/08, 53727/08, 54486/08, and 56001/08, (May 31, 2011), <http://hudoc.echr.coe.int/>. See Cristina Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, MAX WEBER PROGRAMME WORKING PAPERS (2014).

<sup>132</sup> In this context, the “Case-Law Exchange Network with Highest Courts,” recently established by the European Court of Human Rights, represents a crucial intermediate step.