Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court

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The European human rights protection system is about to undergo a far-reaching reform. The highest national courts, if they meet with difficulties applying the European Convention of Human Rights, will be able to ask the Strasbourg Court for an advisory opinion. This measure might have great impact in the functionality of the system – though, whether beneficial or not remains to be seen.

What happened? This week the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe has adopted a draft opinion on Protocol 16 which will widen the advisory jurisdiction of the European Court of Human Rights (ECtHR or Court). The opinion is mostly positive and it is another step on the way to the adoption of the abovementioned protocol which will enter into force once 10 Contracting Parties ratify it.

Advisory opinions are well known in international law. Their main purpose is to provide authoritative legal interpretations avoiding confrontation which is inevitable in contentious cases. Advisory opinions are usually not binding. According to the European Convention of Human Rights (ECHR) the Court has a competence to render advisory opinions, but this competence is significantly restricted. These restrictions are twofold: first, the ECtHR cannot adopt opinions on any issues concerned with interpretation of rights enshrined in the ECHR or admissibility criteria; second, the advisory opinion can be only requested by the Committee of Ministers of the Council of Europe. It is not surprising therefore that there were only three requests brought and two opinions delivered since advisory jurisdiction was introduced to the ECHR by Protocol 2 in the 70s.

The idea of reforming the advisory opinion jurisdiction has been discussed nearly from the very moment of its introduction. It has, however, not materialised into legislative proposals until the Brighton Conference on the Future of the ECtHR, organised by the UK government in April 2012. The Brighton Declaration has invited the Committee of Ministers to draft a new protocol widening the Court's power to render advisory opinions on request from the Member States on the interpretation of the ECHR in the context of a specific case at domestic level. The Committee drafted Protocol 16 in the aftermath of the Brighton Conference.

Protocol 16 has removed the abovementioned restrictions on advisory opinions that made this judicial tool ineffective. When Protocol 16 comes into force, the highest national courts will be able to send requests to the Court asking it to interpret some aspect of ECHR law. This is a very brief description of the reform that will be introduced by Protocol 16. Now I will turn to the question of what is the added value of the new extended advisory jurisdiction.

It is an oft repeated mantra to say that the ECtHR has become a victim of its own success. There are more than 100,000 pending applications and the Court increases its productivity every year just to catch up with an increasing number of applications. The Court is facing an unsustainable backlog and it seems that the main task for any reform at this point should be focused on lightening the high workload of the Court.

Protocol 16, however, adds even more cases to the already overburdened Court. According to Protocol 16, advisory opinions will have to be delivered by the Grand Chamber of Court which is formed of 17 judges. The Grand Chamber procedure is complex and long and it does not normally deliver more than 20 judgments per year. The request of the national court can be rejected and no opinion will have to be delivered

but even in this case the rejection will be a reasoned decision of a 5-judge committee. The drafters of the Protocol argue that this procedure will not be adversarial and it will take much less time that the procedure in any contentious cases. However, one can recall that in early days of the Court, its procedure in contentious cases was also not really adversarial but it gradually became such. Moreover, the legitimacy of a procedure where one or both parties would not have an opportunity to present their arguments is questionable. So, one can suggest that even if the length of the advisory opinion procedure will not be as long as a contentious case, it will be considerably burdensome which can be detrimental taking into account the backlog of the Court.

Moreover, delivering of the opinions will have to have a priority over normal contentious cases. It was acknowledged in the Court's opinion on Protocol 16. An advisory opinion will have to be requested by the highest domestic court in the context of a pending case. This case will have to be adjourned until the ECtHR renders advisory opinion. If it takes years for the ECtHR to deliver an advisory opinion, the Court itself arguably contributes to violation of Article 6 of the ECHR which provides for reasonable time of proceedings. This is even more important if the advisory opinion is concerned with such rights as right to liberty and security, or the prohibition of torture where time can be decisive.

If Protocol 16 comes into force the same case could come to the Court twice: first time as a request for advisory opinion and then as a contentious case if one of the parties is not satisfied with how the advisory opinion was implemented by the Court. It seems that double adjudication will not solve the backlog problem of the ECtHR but rather adds to this problem.

The backlog mainly consists of repetitive meritorious or inadmissible applications. The advisory opinion procedure will add almost nothing to solving this problem. In these cases the rules are clear and the national courts should just implement what has already been clearly stated by the ECtHR in various contentious cases. The advisory opinions might be helpful in setting new standards but the Court has more than enough contentious cases to set such standards in nearly all areas of human rights law.

Another reason for introduction of the advisory jurisdiction is to enhance judicial dialogue between the ECtHR and domestic courts of the Contracting Parties. It is hard to say now whether Protocol 16 will fulfil this purpose and it will mostly depend on practical application of the advisory opinion procedure. Here, it suffices to mention two challenges that can make the whole reform ineffective.

Protocol 16 provides that the ECtHR can reject a request for advisory opinion. If the request is rejected the domestic court will have to deliver a decision basing on its own discretion. If one of the parties is not satisfied with this decision it can bring an application back to the ECtHR. Nothing would stop the ECtHR from finding a violation of the Convention if there is one. To avoid this scenario the ECtHR will have to either accept most of the requests which would enlarge its backlog or be more deferential to the decisions taken by national courts in such cases, which is also a questionable strategy. In general, situations like that can undermine rather than enhance cooperation and dialogue between the ECtHR and domestic tribunals.

Finally, it is broadly accepted that judicial dialogue is a positive phenomenon especially in the context of the ECtHR where effectiveness of the ECHR to a significant degree depends on its embeddedness in the national legal order. However, this dialogue should not be limited to Q&A sessions where national courts ask and the ECtHR gives authoritative advice. It limits discretion of national courts and shifts responsibility for hard and important decisions from national courts to the ECtHR.

The theme of reform of advisory opinions cannot be exhausted by this brief blog entry; there are more nuanced arguments pro and contra this reform. For more profound discussion of this reform see, K. Dzehtsiarou 'Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy' In S. Flogaitis, T. Zwart and J. Fraser (eds.) The European Court Of Human Rights And Its Discontents: Turning Criticism into Strength (Elgar, 2014) and K.

Dzehtsiarou and N. O'Meara 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' Legal Studies (forthcoming, 2014).

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