Maintaining Resilience in Human Rights Interpretation

The ECtHR's Approach to National Security in the Religious Movement Advisory Opinion

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On 14 December 2023, the European Court of Human Rights (ECtHR, the Court) issued an advisory opinion on whether an individual may be denied authorisation to work as a security guard or officer due to associations with a religious movement (here referred to as the 'Religious Movement Opinion'). This opinion was requested by the Belgian *Conseil d'État*. It is the Court's seventh advisory opinion under the European Convention on Human Rights' ('the Convention') Protocol No. 16 and the first one that concerns national security.

This blog post argues that the Religious Movement Opinion highlights a significant potential of advisory opinions for enhancing European resilience when interpreting rights within a national security context. Resilience is here referred to as the capacity to experience shocks without significantly weakening rights protection. In the evolving security climate where European security and defence policies are changing and rights restrictions may increase, advisory opinions could play a role in resisting the weakening of rights interpretation. The argument proceeds as follows. Firstly, the guiding function and spirit of dialogue in the advisory opinion procedure sets it apart from individual applications. Secondly, the Court established detailed risk and proportionality assessment criteria in the Religious Movement Opinion. Thirdly, these criteria diverge significantly from the Court's contentious case law in individual national security cases. Thus, it is argued, the ECtHR seems eager to embrace its standard-setting role and the spirit of dialogue inherent in its advisory opinion procedure, even in a national security context. Under the important conditions that they are requested and sufficiently recognised, advisory opinions could play a role in maintaining resilience in rights interpretation within the current security climate.

Setting advisory opinions apart from individual applications through their guiding function and spirit of dialogue

Far more than individual cases, advisory opinions are aimed at clarifying or establishing the Convention's interpretive doctrines (see generally Oellers-Frahm). During the preliminary work on extending the Court's advisory jurisdiction, one of the arguments was that this jurisdiction would enhance the Court's 'constitutional' role. This was understood as allowing it to develop the Convention interpretation with respect to all Contracting Parties, fostering harmonious interpretation of the Convention rights, especially in matters of principle, and setting clear standards for Convention interpretation (see the Court's Reflection Paper). In the Religious Movement Opinion, the Court also held that its role consists of 'indicating, in a general manner, the criteria under the Convention that it considers relevant to enable the requesting court to examine the dispute before it' (para 65). This guiding function, with respect to both the requesting court and all Contracting Parties, is central to the Court's advisory opinion procedure.

The procedure was also introduced to reinforce the implementation of the Convention and to diminish the Court's caseload (Gerards has identified the strengthening of interaction and reduction of caseload as the main aims of Protocol No. 16). These aims, too, can be reasons to provide the domestic courts with sufficient guidance on Convention interpretation so that they can ensure compliance with the Convention obligations.

The centrality of the guiding function can deviate from the Court's role in individual cases, where it is called to decide upon the disagreement between the individual and the government and may be providing individual justice (on maintaining the right to individual petition see Dembour, on individual justice Kurban, and on the Court's many functions, Çalı). It also differs from a well-known fluidity, or relativity, of the Court's Convention interpretation in individual cases. As the Court's advisory opinion antecedes a final domestic rights assessment, the guidance provided in advisory opinions can also hardly be relative to it (this relativity is a well-known trait of individual cases, noted among others by Spielmann and Kleinlein).

The aim of the advisory opinion procedure 'is to further enhance the interaction between the Court and national authorities' (para 61). The advisory opinion procedure manifests a spirit of collaboration and dialogue. In this way, advisory opinions can change the possible opposition between the Court and a government, which is prevalent in individual cases, to a question of dialogue (Voland and Shiebel, see also the Preamble to Protocol No. 16). During an advisory opinion procedure, there is no final domestic decision that the Court's Convention interpretation could possibly oppose or challenge. Hence, the spirit of dialogue underlying the procedure provides, in principle, a two-way collaborative system, which, compared to the more top-down relationship between the Court and the national authorities in individual applications, may be a fertile ground for providing detailed guidance on rights interpretation. If such interpretation is also accepted domestically, it could even offer a tool for enhanced effectiveness of rights protection (in this vein de Búrca).

In accordance with the spirit of dialogue, advisory opinions are non-binding. Non-bindingness may signal that the rights interpretations provided in advisory opinions can be subject to adjustment, which could imply less opposition from stakeholders and incentivise the Court to develop rights guarantees.

Together with the guiding function of advisory opinions, the spirit of dialogue also contrasts with many deferential concerns of the Court in individual contentious cases. These deferential concerns are often prevalent in national security matters before international courts. For the ECtHR, the most prominent of these concerns is the principle of subsidiarity. It requires the Court to intervene only when the domestic authorities are incapable of fulfilling the task of ensuring the protection of Convention rights. The primary responsibility for protecting Convention rights lies with the Contracting Parties. Subsidiarity can thereby serve different interests, such as the sovereignty of the Contracting Parties, respect for the autonomy of their legal systems, the epistemic knowledge of the domestic authorities and courts, and the efficiency of the Court itself and rights protection. Yet, many of the rationales for deference do not seem to apply in the same way in advisory proceedings as when an individual has challenged the domestic interpretation before the Court. If an advisory opinion is requested, the requesting authority does not suggest that there is a need to refrain from detailed rights interpretation; quite the contrary.

Criteria established in the Religious Movement Opinion

In the Religious Movement Opinion, the Court deemed that an individual's association with a religious movement, which is considered a threat to the state, may justify denying them work as a security guard or officer. This admittedly diverges from those earlier cases, which emphasise that because of the importance of religious pluralism in a democratic society, national security cannot justify exceptions to the right to freedom of thought, conscience, and religion (*Nolan and K* para 73). Yet, the Court also outlined detailed criteria for such denial of work to be compatible with the Convention. It focused on the thoroughness of risk assessment and substantive assessment of justifiability and proportionality.

The Court held that domestic authorities must base their analysis on evidence revealing whether the individual poses a risk of harmful acts prompted by the religious ideology. This assessment needs to take into account several factors about the individual and their conduct (para 97).

Preventive measures also require an individual and detailed risk assessment that considers various contextual factors listed by the Court (para 100). The assessment must review the individual's allegiance to the religious movement (para 101). A mere speculative danger is insufficient; the risk must be serious and specific (paras 103–104). The assessment must also avoid discrimination (para 100). In addition, the Court required a review of the immediacy of the risk and the likelihood of behavior incompatible with democratic values, considering the person's background and allegiance to the religious movement (paras 106–110).

A thorough proportionality assessment is also necessary, which requires that the aim cannot be pursued by any less intrusive means and that the consequences of the measure for the individual are justified. This includes considering the nature of the security guard or officer's duties, the individual's adherence to the religious movement, potential adjustments by the employer, and that the measure does not force abandonment of beliefs or active practice in the movement (paras 113–118).

Deviation from previous case law in individual applications

The detailed requirements in the Religious Movement Opinion depart from some central principles and previous individual cases involving national security.

First, the opinion deviates from cases concerning military servicemen who participate in the activities of religious communities with fundamental tendencies (*Kalaç* and *Gündoğdu*). In these cases, the Court has accepted the domestic authorities' decisions to dismiss applicants from the armed forces without subjecting those decisions to a detailed review. In *Kalaç*, it was decisive that the applicant had chosen a military career and thereby, by his own accord, accepted a system of military discipline, where an 'attitude inimical to an established order reflecting the requirements of military service' could be sanctioned.

Second, when finding a Convention violation in national security cases concerning religious activities, the Court has generally concluded its review on grounds other than individual risk and proportionality assessments. Examples include failure to comply with the lawfulness requirement (*Perry*), an absent possibility to challenge before an independent authority that national security was at stake, and an absent substantive review of this matter (*Nolan and K*). Similarly, in national security cases involving measures taken to ensure civil servants' loyalty to the state, the Court has often required an individualised assessment, sufficiently individualised legislation, or rejected the absoluteness of such measures when finding a Convention violation (*Sõro* para 61; *Sidabras and Džiautas* para 59, *Vogt* [GC] paras 59–61). Although these requirements of individualised assessments may remind of those established in the Religious Movement Opinion, they are less detailed. In contentious national security cases, the Court has often avoided establishing more comprehensive requirements on risk or proportionality assessment.

The Court has also restricted the scope of Convention rights protection in national security cases. For instance, the Convention does not recognise a right to be recruited to the civil service or to be issued a security clearance, and the Court has accepted requirements on loyalty to the state, and impartiality and political neutrality of the civil service (see for instance, *Glasenapp* para 49; *Sidabras and Džiautas* para 52 and 57; *Regner* [GC] para 115; *Strzelecki* para 44; *Žičkus* para 28). These concerns are not prevalent in the Religious Movement Opinion.

Finally, in national security cases that concern qualified rights (that is, rights that can permit interferences), the Court's case law often includes deferential concerns. They do not seldom accompany the Court's review when concluding cases on grounds other than an in-depth risk and proportionality assessment. For instance, the Court has held that it seeks to refrain from second-judging domestic risk assessments on national security. It often refers to subsidiarity, the domestic authorities being better placed to assess evidence on national security threats, and to a margin of appreciation in such matters (see for instance, *Centrum för Rättvisa* [GC] para 252; *Liu (No. 2)* para 85; *Šeks* para 63; *Kaushal and Others* para 28; *Karapetyan and Others* para 48).

A potential for resilience in rights interpretation

In sum, the Religious Movement Opinion significantly clarified and developed rights requirements in the field of national security. These detailed criteria for risk and proportionality assessment show that the Court seems eager to embrace its standard-setting role and the spirit of dialogue inherent in the advisory opinion procedure. The criteria deviate from much of the deferential case law in contentious national security cases. In contrast with the Court's initial practice of interpreting the Convention in advisory opinions (see Lavrysen), the Religious Movement Opinion provides an example of how the Court may develop rights guarantees through advisory opinions.

The Court's interpretations are but a small part of building true resilience of rights in the current security context. For the advisory opinion procedure to form part of such a resilience, opinions must be requested, implemented, and understood as authoritative. There should be no misconceptions regarding the challenges of achieving this in the European arena. Yet, from the perspective of the impact the Court has had on rights interpretation in Europe up to now (see for instance, Keller and Stone Sweet (eds.)), the Religious Movement Opinion shows a glimpse of potential for resilience in rights interpretation, even within the sensitive national security context.

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