

Normative Guidance from Strasbourg Through Advisory Opinions

Deprivation or Relocation of the Convention's Core?

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Abstract

The cooperative compound structure between the European Court of Human Rights (ECtHR) and the highest domestic courts will become more closely-knit and achieve an intensified judicial interaction through the new advisory jurisdiction of Protocol (Prot.) 16 European Convention on Human Rights (ECHR). It establishes a new procedural mechanism which will allow the ECtHR to give advisory opinions on questions of principle ahead

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of the final domestic court decision. This institutionalizes and thus stimulates the dialogue between the ECtHR and the highest domestic courts. By conferring upon the Court a guiding function on Convention standards, the Protocol reinforces the ECtHR's constitutional role – a paradigm shift whereby the predominant individual justice approach is complemented by a constitutional one. All in all, this has the potential to foster the ECHR's viability, domestic compliance and an enhanced coherence of the European public order of human rights. Yet, it will have to be operationalized in a conscientious way so as not to unsettle the balance between the ECtHR, the domestic apex courts and, in the wider context, the Court of Justice of the European Union (CJEU).

I. Introduction

The ECtHR is at a crossroad. Should the Court be limited to its task to deliver unconditional individual justice, deciding each application on a case by case basis for the purpose of rendering legal redress to the individual in the form of compensation? Or should the constitutional justice approach guide the Court's future role? The ECtHR would then advance a normative vision of the Convention, giving directions on important questions of principle that are crucial for the further development of Convention standards and that may prompt and facilitate domestic law reforms. While up to Prot. 11 the common aim of the Convention states, the Court as well as the political organs of the Council of Europe (CoE) was to create and strengthen the Court's function as the arbiter of individual human rights complaints, the focus has shifted in the last decade. Due to the overwhelming workload and the growing criticism of some Convention states concerning the Court's activism, the political CoE organs, the Convention states and the ECtHR have tried to develop new strategies to bolster the Court's authority and its effectiveness at the national level and to come up with an adequate conceptualization of the Court's future role within the multi-level institutional framework. Several high-level conferences – Interlaken, Izmir and Brighton – as well as Protocols 14, 15 and 16 have dealt with this topic. Based on the concept that the ECtHR and the highest domestic courts fulfil their shared responsibility to develop the common European public order of human rights in a constitutional courts compound¹ – i.e. a non-hierarchical hori-

¹ For this concept, see A. Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, NVwZ 29 (2010), 1, 3; 3 et seq. for the relationship between the German Federal Constitutional Court (FCC) and the ECtHR specifically. For a profound analysis of the compound concept,

zontal network of courts serving their specific and delimited, but complementary constitutional functions in a cooperative way – formal, material and procedural mechanisms are required to harmoniously structure and stimulate the courts' interaction, compliance and the case-law's coherence. Prot. 16 enacts such a mechanism (II.).² Moreover, it asserts the ECtHR's constitutional role by institutionalizing the ECtHR's delivery of justice beyond the single case, a paradigm shift from the long predominant individual justice approach (III.). Arguably reconcilable with the Court's duty to deliver individual justice, this constitutes an adequate response to the Convention's incremental constitutionalisation and serves as a helpful technique to tackle the onerous backlog of pending cases by effectively dealing with structural and systemic legal problems. Bearing the risk of irritating the relationship between the ECtHR, domestic apex courts as well as the CJEU, the new procedure will have to be executed in a conscientious manner.

II. A Good Compromise or a Paper Tiger?

In comparison to other international advisory competences, Prot. 16 enacts an advisory competence *sui generis*³ since the EU preliminary reference procedure served as the procedural model.⁴ According to Art. 1 (1) Prot. 16, the highest domestic courts may ask the Court for an advisory opinion relating to “questions of principle concerning the interpretation and application of the rights and freedoms of the Convention and the Protocols thereto”. A domestic court or tribunal may only request an advisory opinion on a case pending before it (Art. 1 (2) Prot. 16). It is required to give reasons for its request and to provide the relevant legal and factual background of the pending case (Art. 1 (3) Prot. 16). A panel of five judges of the Grand Chamber may reject the request, but it shall give reasons if it does so (Art. 2 (1) Prot. 16).⁵ Every Convention state has to determine its own highest

see *I. Pernice*, La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie, *ZaöRV* 70 (2010), 51, 60 et seq.

² The protocol will enter into force once ten Convention states have ratified it (Art. 8 (1)). So far, 14 Convention states have signed the protocol.

³ Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15.11.2006, 979bis Meeting, available at <<https://wcd.coe.int>>, para. 81, titling the advisory opinion procedure an innovation.

⁴ Group of Wise Persons Report (note 3), para. 80; *P. 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, *E.L.Rev.* 38 (2013), 229.

⁵ The Court preferred issuing general guidelines on the scope and functioning of its advisory jurisdiction. Nevertheless, it accepted the provision for the purpose of a constructive

courts for the purposes of the Protocol (Art. 10 Prot. 16). The Grand Chamber has jurisdiction (Art. 2 (2) Prot. 16). The Convention state of the requesting court and the Commissioner of Human Rights may submit written comments and take part in any hearing (Art. 3 Prot. 16). The Court president may invite further Convention states and persons to the proceedings (Art. 3 Prot. 16). Reasons shall be given for an advisory opinion, separate opinions are allowed (Art. 4 (1), (2) Prot. 16). The opinions must be communicated to the requesting court and to the Convention state to which the court belongs, and they must be published (Art. 4 (3), (4) Prot. 16). They are not legally binding (Art. 5 Prot. 16).

The new cooperative mechanism is only viable, if it actually encourages and facilitates the harmonious interaction between the courts. In the Convention context the structural concept of subsidiarity is used to adequately allocate the competences and responsibilities between the ECtHR and the domestic authorities.⁶ Thus, trying to reconcile the principle of subsidiarity with the objectives to fuel the courts' interaction (1.), the coherence of the Convention's and the common European human rights jurisprudence (2.), the Convention's implementation at the domestic level (3.) and its viability by decreasing the Court's workload (4.), the Protocol provides for the procedure to be non-obligatory, for the opinions to be non-binding and leaves it to the Convention states to decide which courts should be entitled to make a request for an advisory opinion (5.). Are these stipulations counter-productive to the proclaimed aspirations, rendering the Protocol a paper tiger, or do they represent a good compromise?

1. Fostering Cooperative Court-Dialogue

To render the Protocol effective, the institutionalized dialogue⁷ would have to deliver incentives for domestic courts to engage in it⁸ without being

dialogue with the domestic courts, underlining, however, that such reasons will normally not be extensive, Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, 6.5.2012, para. 3, 1.

⁶ See Arts. 13 and 35 (2) ECHR; Art. 1 Prot. 15 ECHR will enter the duty to respect the structural principle of subsidiarity in the preamble of the Convention; cf. ECtHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* (merits), Judgment of 23.7.1968, Appl. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Series A No. 6, B. § 10; ECtHR, *Scordino v. Italy (No. 1)* [GC], Judgment of 26.3.2006, Appl. No. 36813/97, ECHR 2006-V, § 140.

⁷ Proclaimed as the procedure's aim in Interlaken Declaration, 19.2.2010, 2nd reiteration of the Conference, 2; the Brighton Declaration, lit. A 9 a), 2; lit. G 32, 8, para. 4, 1; Prot. 16, 3rd

legally obliged to do so. By formalizing the dialogue, the ECtHR's opinions acquire legal authority in domestic court decisions. For weakly positioned domestic courts the reliance on an advisory opinion might thus constitute a mechanism to bolster their internal position with the ECtHR's authority vis-à-vis the other domestic actors.⁹ Moreover, domestic courts might want to preserve their authority by avoiding adverse ECtHR judgments and ask for a non-binding advisory opinion either to be able to "neutralize" the ECtHR's position with convincing arguments in their final decision or in order to comply with it before having been adjudged to do so. Finally, conscientious domestic judges will use the advisory procedure to discharge their legal duty to pursue the domestic law's openness and commitment to international public law and human rights and thereby to contribute their share to the development of the European public order of human rights. In the EU context, domestic courts, after initial skepticism and rejecting even constitutional and supreme courts,¹⁰ have demonstrated their willingness to refer cases to the CJEU. Despite the substantial difference that the preliminary reference procedure is obligatory, the domestic courts' willingness to engage in a cooperative relationship with the CJEU may warrant an optimistic outlook on the future development of an equivalent relationship between the domestic courts and the ECtHR. Finally, the fact that the domestic courts can steer the opinions' direction with their request and the fact that the advisory opinions are of a consultative and non-condemning nature may lower the threshold for domestic courts to refer a case to the ECtHR.¹¹ To conclude, there are indicators that justify the assumption that the highest

para. of the Preamble, Explanatory Report, Introduction para. 1, all available at <<http://www.coe.int>>; Report of the Group of Wise Persons Report (note 3), lit. B 4; Report of the Committee on Legal Affairs and Human Rights, part of the Parliamentary Assembly of the Council of Europe, Doc. 13220, 5.6.2013, para. 2 a, available at <<http://assembly.coe.int>>.

⁸ Informal dialogue has led to more intensive coordination entailing enhanced coherence and compliance, see e.g. *M. Villiger*, The Dialogue of Judges, in: C. Hohmann-Dennhardt/P. Masuch/M. Villiger (eds.), *Festschrift für Renate Jaeger*, Grundrechte und Solidarität: Durchsetzung und Verfahren, 2011, 195, at 202 et seq.

⁹ See *A. S. Sweet*, A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe, *Journal of Global Constitutionalism* 1 (2012), 53 et seq., at 68 et seq.; cf. also *E. Benvenisti*, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, *AJIL* 102 (2008), 241 who argues that international law has become an effective instrument of empowerment and protection vis-à-vis other powerful domestic economic, political or legal actors.

¹⁰ See e.g. the FCC, BVerfG, 2 BvR 2728/13, 14.1.2014; the Court de Cassation, CC, Déclaration No. 2013-314P QPC, 4.4.2013; the Spanish Constitutional Tribunal, Order ATC 86/2011, 9.6.2011; the Italian Constitutional Court, Judgment No. 102/2008 and order No. 103/2008.

¹¹ ECtHR, Opinion of the Court on the Wise Persons' Report, 2.4.2007, Comment II. 4, available at <www.echr.coe.int>.

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domestic courts will embark on the envisaged dialogue with the ECtHR. But will this advance the coordination of the courts' human rights jurisprudence and promote the domestic implementation of the Convention standards, notwithstanding the opinions' non-binding nature?

2. Enhancing the Coherence of the European Human Rights Jurisprudence

The procedure's consultation mechanism empowers domestic judges to avoid sharp divergences between their and the ECtHR's case-law and thus to enhance the common case-law's coherence.¹² By delimiting the courts' competences in accordance with the principle of subsidiarity, the procedure formally provides for coherence.¹³ Materially, multi-level coherence is driven by the courts' willingness to coordinate their case-law. Possible triggers are the ambition to develop the common legal system of human rights protection, progress in mutual understanding and common knowledge and a procedure that interweaves the different legal discourses. The last point is where Prot. 16 develops its greatest strength. It provides a procedure in which the courts have to respond to and persuade each other, to contest or accept the other's arguments. The domestic court is required to give reasons for its request and to present the relevant legal and factual background of the pending case, including the relevant domestic law, Convention issues and, if possible and appropriate, a statement of its own views (Art. 1 (3) Prot. 16).¹⁴ The Grand Chamber must adduce reasons for its decision not to accept the request (Art. 2 (1) Prot. 16) or for the advisory opinion (Art. 4 (1) Prot. 16) in which it may find the domestic law to be incompatible with the Convention.¹⁵ Ultimately, the domestic court will pass its judgment (Art. 5 Prot. 16). In case the ECtHR or the domestic court wants to deviate from the other's argument, the professional ethos and respect will require the re-

¹² For the notion of coherence, see *A. Voßkuhle* (note 1), 4 et seq. concerning the ECtHR/FCC cooperation.

¹³ Each court is responsible for and retains the authority of its own jurisdiction (Arts. 1 I, III, 5). Nevertheless, Prot. 16 implies a coherence that encompasses domestic and Convention law whereas the preliminary reference procedure is limited to ensuring the unity of EU law (CJEU, *Foto-Frost*, 22.10.1987, Case 314/85; similarly, for a notion of coherence that is provided in each separate legal regime and mainly procedurally secured, see *W. Hoffmann-Riem*, *Kohärenz der Anwendung europäischer und nationaler Grundrechte*, EuGRZ 29 (2002), 473.

¹⁴ See the Explanatory Report of Protocol 16, § 12.

¹⁵ ECtHR Reflection Paper on the Proposal to extend the Court's advisory jurisdiction, # 3853038, III. 3., para. 29, fn. 29, paras. 30-31.

spective court to adduce cogent reasons, since both the request (particularly if presented with a separate analysis) and the opinion present authoritative interpretations of analogous substantive legal questions. Hence, the “protocol of judicial dialogue”¹⁶ may stimulate a common legal discourse on the “guiding principles of European human rights law”, which may synthesize opposing views and help to approximate different legal concepts and notions.¹⁷ By focusing the exchange of information on few relevant points of law and by urging the courts to listen to and learn from each other, the procedure also furthers mutual understanding and common knowledge which may motivate the courts to coordinate and advance their case-law’s consistent interpretation. The new procedural instrument, thus, bears the potential to advance the coherence of European human rights jurisprudence. Moreover, by concentrating on the development of questions of principle (Art. 1 Prot. 16), the Court will be able to consistently refine its own jurisprudence beyond the narrowly focused case-by-case assessment.¹⁸ Since highest domestic courts will be the first to deal with Strasbourg’s statements, the uniform application of ECHR law in the hierarchically structured domestic legal orders will also be supported.

3. Reinforcing the Convention’s Domestic Implementation

To help reinforce the Convention’s domestic implementation¹⁹ the advisory opinions have to elicit compliance by other means than their legally binding nature. The contribution of non-binding advisory opinions to the development of international law is undisputed.²⁰ Being statements of prin-

¹⁶ Court President *D. Spielmann* in his Address at the Meeting with the Supreme Court and the Supreme Administrative Court, 19.5.2014, at 5.

¹⁷ Cf. *A. v. Bogdandy/I. Venzke*, In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification, *EJIL* 23 (2012), 38, for the idea that an international law-based dialogue between specialized international courts might lead to the convergence of their interpretations. The underlying concept is that of interpretive communities, developed by *S. Fish*, Is There a Text in This Class?, 1980, 171.

¹⁸ The argument that advisory opinions may constitute a guarantee of the Convention’s uniform interpretation – an essentiality for law-making treaties – was already made by *J. A. Frowein*, The Guarantees Afforded by the Institutional Machinery of the Convention, in: *A. H. Robertson* (ed.), *Privacy and Human Rights*, 1973, 284, 296 et seq. and *A. H. Robertson*, Advisory Opinions of the Court of Human Rights, in: *René Cassin Amicorum discipulorumque liber*, I (1969), 225 et seq.

¹⁹ This aim was already confirmed in the Interlaken Declaration, 19.2.2010, 4th reaffirmation of the Conference, 2, see particularly the Brighton Declaration, lit. E para. 23.

²⁰ *K. Oellers-Frahm*, Lawmaking Through Advisory Opinions?, *GLJ* 12 (2011) 1033, 1040 et seq.

principle, they generate and stabilize normative expectations for the further legal discourse,²¹ thus constituting an argumentative burden on states and delivering arguments for the justification of state actions.²² They have been attributed persuasive character and substantive authority²³ and have as such been compared to declaratory judgments²⁴ for sharing the same high judicial quality.²⁵ They have generated broad acceptance and compliance within the international community.²⁶

Most likely, advisory opinions by the ECtHR will have an equal effect. The Court will only accept requests for advisory opinions in areas where the law is evolving or controversial. By clarifying the law at a stage of uncertainty, the opinions will channel the judicial discourse on legal concepts from the beginning. Advisory opinions will assist the highest domestic courts to apply the Convention standards and to avoid future violations.²⁷ Domestic judges will be induced by their professional ethos and respect to follow an advisory opinion if they cannot convincingly argue the contrary.²⁸ Moreover, being interwoven into an “interpretive community” of European constitutional courts will raise the domestic courts’ motivation to follow the “jointly developed” Convention standards. In the long run, the ECtHR’s proclaimed use of the advisory opinions as quasi-precedents²⁹ – with reference to the respective practice of the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ)³⁰ – will confer an “undeniable legal effect” upon them for the domestic courts.³¹ Anal-

²¹ The creation and stabilization of normative expectations is considered by many contemporary theories as the core function of law, see *J. Habermas*, *Between Facts and Norms*, 1997, at 427; *N. Luhmann*, *Das Recht der Gesellschaft*, 1995, 151.

²² *K. Oellers-Frahm* (note 20), 1047.

²³ *G. Fitzmaurice*, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points*, BYIL 28 (1951), 1, at 55; *D. Prapat*, *The Advisory Jurisdiction of the International Court*, 1972, 231 et seq.; *K. Oellers-Frahm* (note 20), at 1046 et seq.

²⁴ *L. M. Goodrich*, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, AJIL 32 (1938), 738, at 756; *D. Prapat* (note 23), 232 et seq.

²⁵ *D. Prapat* (note 23), 227.

²⁶ Familiar exceptions are South Africa with regard to the *Namibia* opinion and Israel with regard to the *Wall* opinion.

²⁷ This explanation was first given in the Final Declaration of the Izmir Conference and cited in the Explanatory Report Protocol 6, para. 2.

²⁸ In order to strengthen the authoritative nature of an advisory opinion, it should be delivered at least by the majority of the judges. Cf. Rule 88 para. 1 Rules of the Court for the advisory opinions delivered under Arts. 47-49. Too many separate opinions might otherwise counteract the effect of an authoritative guidance.

²⁹ ECtHR Reflection Paper (note 15), III. 5. para. 44.

³⁰ ECtHR Reflection Paper (note 15), III. 5. para. 44, fn. 46 and 47.

³¹ ECtHR Reflection Paper (note 15), III. 5. para. 44.

ogous to judgments,³² advisory opinions will consequently develop a pan-European effect of normative guidance. It would be difficult to apply the developed general statements of principle, as envisaged by Art. 1 (1) Prot. 16, only to the Convention state to which the requesting court pertains.³³ Furthermore, since highest domestic courts will have to discuss the advisory opinions in their final judgments, the general awareness of Convention standards amongst lower domestic courts will also be raised, which will contribute to domestic compliance.³⁴ Finally, to give a supportive example from practice, the two advisory opinions delivered by the Court under Art. 47 ECHR have also been obeyed.

Yet, compliance could be compromised if the Court's authority was jeopardized by the fact that the Court may depart from its own advisory opinions in subsequent individual complaint procedures. In Germany, the controversy concerning the internal legal authority of the German Federal Constitutional Court's own advisory opinions led to their abolition.³⁵ As mentioned, however, the Court will treat advisory opinions as precedents. Hence, inconsistencies between the advisory and the contentious jurisdiction are not bound to occur more often than within the contentious jurisdiction itself.³⁶ In sum, Prot. 16 bears the potential to induce ECtHR-instructed domestic implementation despite its lacking legal force.

³² For the quasi *erga omnes* effect of ECtHR judgments, see ECtHR [Plenary], *Ireland v. United Kingdom*, Judgment of 18.1.1978, Application no. 5310/71, Series A no. 25, § 154.

³³ ECtHR Reflection Paper (note 15), III. 5. para. 44 and *K. Oellers-Frahm* (note 20), 1051.

³⁴ As pointed out by the Interlaken Declaration (note 7), lit. B 4. a).

³⁵ The FCC decided to accord them court-internal binding effect, BVerfGE 2, 79 which was met with disapproval by the government and parliament, *W. Heyde*, in: D. Umbach/T. Clemens/F.-W. Dollinger (eds.), *Bundesverfassungsgerichtsgesetz: Mitarbeiterkommentar und Handbuch*, § 97 BVerfGG (repealed), paras. 3-5.

³⁶ Another question is whether the authority could be impaired by the fact that Chambers could depart from the Grand Chambers' advisory opinions. However, since advisory opinions are only accepted for questions of principle, Art. 30 ECHR would require a Chamber to relinquish a subsequent individual complaint to the Grand Chamber and according to Art. 43 (2) ECHR the Grand Chamber could ultimately seize the jurisdiction of the case. Art. 30 and Art. 43 (2) ECHR stipulate similar conditions for the relinquishment to the Grand Chamber and the seizure of a case by the Grand Chamber; *J. Meyer-Ladewig*, EMRK Kommentar, 2011, Art. 43 para. 7. The ECtHR contemplated an amendment of the Rules of Court, which may force a Chamber to relinquish its jurisdiction if it anticipates to deviate from established case-law, see Brighton Declaration, lit. E, para. 23, an idea which could be transferred to the anticipated departure from advisory opinions.

4. Reducing the Workload

Due to the non-binding nature of the advisory opinion the potential accumulation of the advisory and the individual complaint procedure with respect to the same subject matter will have the adverse effect of increasing the Court's workload in the near future. However, the Protocol reinforces the subsidiary nature of the Convention by assisting the domestic courts to fulfill their primary role as guarantors of individual relief. Moreover, integrating the ECtHR's opinion into the domestic decision-making process, quasi *ex ante*, may increase the efficiency of the judicial remedial procedure. By contrast the individual complaint procedure the ECtHR's decision follows the domestic remedial procedure *ex post*. The implementation consequently requires the reopening of the domestic procedure. In contrast to the pilot judgment procedure, in its advisory jurisdiction the Court can act before repetitive cases have emerged. Furthermore, only highest domestic courts are entitled to make a request and the possibility to ask for an advisory opinion is restricted to cases pending before the highest domestic courts, both of which limits the advisory jurisdiction's scope of application.³⁷ Ultimately, the requirement that reasons shall be given for a request and that the request's acceptance is within the Grand Chamber's discretion also helps to avoid an unfiltered rush for advisory opinions.³⁸ In the long run, the Protocol thus has the potential of reducing the Court's workload.

5. Avoiding Misuse

Pursuing the rationale of preserving the principle of subsidiarity, the Protocol allows the Convention states to specify their "highest courts" under Art. 10 Prot. 16. This option appears questionable, as considerations of loyalty might be determinative. Whereas the term "highest courts" is not very

³⁷ ECtHR Reflection Paper (note 15), III. 2., para. 26; by contrast, the scope of the IACtHR's advisory jurisdiction and the admissible applicants are stipulated in much broader terms. However, the IACtHR is not comparable in this respect, as the advisory opinion was developed to attract member states to seize the Court's jurisdiction. In fact, it was only after having delivered eight advisory opinions that it handed down its first judgment in its capacity as a contentious jurisdiction.

³⁸ By virtue of the similarity to the preliminary reference procedure, it is likely that the Court will refer to the already thoroughly elaborated doctrines of *acte claire* and *éclairé* of the CJEU to limit the admissibility of applications, B. W. Wegener, in: C. Calliess/M. Ruffert (eds.), EUV/AEUV Kommentar, 2011, Art. 267 TFEU, para. 32 with further references; CJEU, 283/81, ECR 1982, 3415, paras. 13 et seq. (CILFIT).

bendable, it is critical that the Explanatory Report to the Protocol suggests that the Convention states “may at any time change [their] specification of [the] highest courts or tribunals that may request an advisory opinion”.³⁹ Barring the Convention states from freely changing their specification would have been crucial for the credibility and the viability of the procedure. The CJEU’s jurisprudence on the “court of last instance” could serve as guidance for a good practice in this regard.

6. Taking Stock

In conclusion, the Protocol delivers a viable mechanism for the European constitutional courts compound to become more closely-knit and more coherent by enhanced interaction. It strikes a good balance between the objective of improving the ECHR’s effectiveness vis-à-vis the highest domestic courts and the preservation of the structural principle of subsidiarity. With respect to reducing the Court’s workload, it remains problematic, at least in the short-term, that the advisory and the individual complaint procedures are non-exclusive.

III. A Shift Towards Constitutional Justice

Underlying the positive assessment is the reason that Prot. 16 aims at strengthening the Court’s “constitutional role” (1.).⁴⁰ The ensuing “constitutional dialogue” may yield the potential to develop a closer cooperative relationship between the ECtHR and the highest domestic courts as “constitutional courts” of the European public order of human rights. Yet, this paradigm shift also implies a fundamental change for the ECHR. Seen through the lens of the individual, the development has to be defended against the reproach of compromising the delivery of individual justice (2.). Furthermore, the advisory procedure could fundamentally change the roles of the courts vis-à-vis each other (3.). The concern to avoid the resurrection of a pyramid structure delivers an explanation why the advisory opinions were not endowed with a legally binding effect, although this might have alleviated the workload problem (3.).

³⁹ Explanatory Report Protocol 16, Art. 1 para. 8.

⁴⁰ Explanatory Report Protocol 16, Introduction and para. 1; Report of the Group of Wise Persons (note 3), context, I. para. 24, constitutional “mission”, II. lit. B 4 para. 81, III. lit. B. 4 para. 135; ECtHR Reflection Paper (note 15), II. 1. 5.

1. The Notion of Constitutional Justice in the ECHR Context

The first one to introduce the term constitutional justice into the discussion on the future of the Court was former Court President *Wildhaber*. He had in mind the US Supreme Court which may choose to accept a case if it deems it to be important for the development of the constitutional legal system and on the basis of which it may formulate guiding principles for US constitutional law.⁴¹ *Wildhaber* saw this as a model for the ECHR to reinforce the subsidiary structure of the Convention and thus to relieve the Court from a bulk of repetitive and insignificant cases.⁴² Ever since, the idea of a constitutional function of the ECtHR has become subject to a variety of interpretations that go far beyond the meaning accorded to it by *Wildhaber*.

The ECtHR's constitutional function cannot be based on an entitlement to strike down domestic laws,⁴³ as has been done regarding the IACtHR with recourse to its recognized power to annul amnesty laws.⁴⁴ Still, the Convention's incorporation into the domestic legal systems is deemed to compensate for the lacking competence of the ECtHR to invalidate domestic laws, especially in countries where the Convention ranks above statute and is judicially enforceable.⁴⁵ Generally, a constitutional role of the ECtHR is recognized to the extent that the Court is functionally equivalent to the domestic constitutional and supreme courts concerning human rights complaints. In part, the ECtHR is seen as a quasi-constitutional court for hearing the same cases, using similar methods and techniques, for pursuing the ambition to develop a coherent pan-European system of judicial relief

⁴¹ See *L. Wildhaber*, Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte?, EuGRZ 29 (2002), 569 et seq., at 573; *L. Wildhaber*, Ein Überdenken des Zustands und der Zukunft des Europäischen Gerichtshofs für Menschenrechte, EuGRZ 36 (2009), 541 et seq., at 552 with further references.

⁴² See (note 41).

⁴³ Since *Marbury v. Madison*, the decisive criterion for the recognition of a domestic court's constitutional role is its entitlement to strike down laws of parliament, see *A. v. Bogdandy/I. Venzke*, In wessen Namen?, 2014, at 179.

⁴⁴ *C. Binder*, Auf dem Weg zum lateinamerikanischen Verfassungsgericht?, ZaöRV 71 (2011), 1.

⁴⁵ The argument is that the Convention is constitutionalized within the domestic legal systems, *A. S. Sweet*, On the Constitutionalisation of the Convention, The European Court of Human Rights as a Constitutional Court, Faculty Scholarship Series, Yale Law School, Paper 71 (2009), 7; *A. v. Bogdandy/I. Venzke* (note 43), 179, they recognize the ECtHR's constitutional function as ECtHR judgments with constitutional implications have been domestically accepted and implemented, *A. v. Bogdandy/I. Venzke* (note 43), 180 et seq.

for human rights violations⁴⁶ and for exerting comparable persuasive authority in the domestic legal systems.⁴⁷ The pilot procedure is deemed exemplary for the constitutional function because the Court focuses on the underlying systemic and structural defects of domestic laws and urges for law reforms by imposing general measures, hence delivering justice beyond the single case.⁴⁸

In accordance with the idea of a constitutionalisation of public international law,⁴⁹ the ECtHR is classified as a quasi-constitutional court which is responsible for the “constitutional instrument”⁵⁰ that provides for the fundamental principles of democracy, the rule of law and human rights as guiding principles of the European public legal order.⁵¹

Against the backdrop of the CoE’s enlargement, the Court’s task to “socialise” the new member states into the established norms and practices of the human rights regime is also regarded as a constitutional function.⁵²

For the purposes of this article, I will concentrate on the meaning given to the “constitutional role of the Court” by the Court itself when calling for it as an objective of Prot. 16. It concretized the concept along the lines of Wildhaber’s interpretation: “*Advisory opinions provide an opportunity to develop the underlying principles of law in a manner that will speak to the legal systems of all the Contracting Parties. [...] The procedure would thus allow the Court to adopt a larger number of rulings on questions of principle*

⁴⁶ S. Greer/L. Wildhaber, Revisiting the Debate about “constitutionalising” the European Court of Human Rights, HRLR 12 (2012), 655 et seq.; A. S. Sweet (note 45), 5 et seq.; A. Voßkuhle (note 1), 2, with further references, underlining the functional equivalence of the ECHR’s and the German individual complaint procedure.

⁴⁷ A. S. Sweet (note 45), 2.

⁴⁸ W. Sadurski, Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments, HRLR 9 (2009), 402, 449 et seq.

⁴⁹ A. Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, LJIL 19 (2006), 579, at 582 describes “*global (or international) constitutionalization*” [...] as a catchword for the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order”.

⁵⁰ *Loizidou v. Turkey*, Judgment of 23.3.1995, Application No. 15318/89, Ser. A. No. 310, § 75.

⁵¹ L. Wildhaber, Rethinking the European Court of Human Rights, in: J. Christofferson/M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, 2011, 204, at 226, with further references to judgments that have triggered developments of democratisation; W. Sadurski (note 48), at 447 et seq., with reference to Raz’s material conditions for assuming the constitutionality of a legal document; A. S. Sweet (note 45).

⁵² R. Harmsen, The ECHR after Enlargement, *The International Journal of Human Rights* 5 (2001), 18 et seq., at 32 et seq.

and to set clearer standards for human rights protection in Europe.”⁵³ Since the advisory procedure is limited to pending cases and to questions of Convention interpretation, the constitutional function of the ECtHR allows the concrete⁵⁴ but not the abstract review of domestic legislation.⁵⁵ While in 2012 *Greer* and *Wildhaber* found that the argument for a constitutional role of the Court had not yet been accepted in the official debate,⁵⁶ the official documents concerning Prot. 16 have now openly endorsed the constitutional justice approach.

2. Squaring Constitutional Justice with Individual Justice

However, the approach is still criticized today.⁵⁷ The reason is the concern that acknowledging a constitutional role for the Court would prejudice individual justice. This raises the question how the relationship between individual and constitutional justice was supposed to be, should be and whether the Protocol strikes a good balance.

⁵³ ECtHR Reflection Paper (note 15), Proposed Measures, II. lit. B. 4. para. 81. While the Report of the Group of Wise Persons also referred to this role, it did not give any further explanation (note 3), para. 81.

⁵⁴ See the Court’s statements in its Reflection Paper, referring to cases of concrete review in contentious cases (note 15), III. 3., para. 29, fn. 29, paras. 30-31. Due to the fact that highest courts will make the requests for an advisory opinion, reviews of domestic legislation are likely to increase under the new procedure.

⁵⁵ For the rejection of providing the Court with the competence of an abstract review, see Art. 1 para. 10 Explanatory Report Protocol 16; ECtHR Reflection Paper (note 15), III. 3., para. 29, with reference to Doc. DH-GDR(2011)015 FINAL, 4 et seq., para. 7 where abstract review is set out as an option. For an often cited authority on the refusal of abstract and the admission of concrete review, see ECtHR [GC], *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20.10.2011, Application No. 13279/05, §§ 69, 70. The formulation of the IACtHR advisory competence entails a broader constitutional role: the IACtHR may “provide [the requesting] state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments” (Art. 64 (2) American Convention on Human Rights).

⁵⁶ *S. Greer/L. Wildhaber* (note 46), at 659.

⁵⁷ Compare some contributions on the CoE website on the reform of the Court, e.g. by *Janlöv Åsa, Larsson Helena* and *Donovan Lise*; *K. Dzehtsiarou*, Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court, 31.5.2013, available at <<http://www.verfassungsblog.de>>.

a) Delivering Individual Justice – The Core of the Convention System

As a response to *Wildhaber's* proposal *Tomuschat* emphasized that particularly the young democracies need an individual complaint procedure since here one could not simply count on the Convention standards being executed by the domestic justice systems.⁵⁸ But also for the whole of Europe, he underlined that the individual complaint procedure is crucial, because the ECtHR offers legal redress regardless of an individual's citizenship. Reducing the option to autonomously seek justice before the ECtHR would, according to him, jeopardize the individual's confidence in the European supervisory system. Diminishing the option of legal redress would deprive the individual of the legal status it has acquired in public international law, as enshrined in Art. 1 ECHR. By manifesting the prevalence of a European rights-based constitutionalism over the nation states' sovereignty, the individual complaint procedure represents the greatest achievement of the Convention system in *Tomuschat's* view.

Indeed, these powerful arguments militate for the vital practical and normative significance of individual justice. Moreover, recent developments reflect the importance of delivering individual justice. Court reforms were carried out to preserve an unqualified individual complaint procedure for the future.⁵⁹ The Court has developed and expanded the scope of a new remedial tool to order individual measures for the purpose of enforcing the domestic execution of its judgments more effectively in individual cases.⁶⁰ Additionally, official documents and ECtHR decisions often state that the delivery of individual justice is the primary task of the Court.⁶¹ In a practical sense, entitling those who are individually affected to seek legal redress appears to be the most effective method for fostering the implementation of the Convention standards. Without this form of redress, the ECHR would have never been identified as the "European Bill of Rights".⁶² By contrast,

⁵⁸ For the following discussion, see *C. Tomuschat*, Individueller Rechtsschutz: Das Herzstück des "ordre public européen" nach der Europäischen Menschenrechtskonvention, *EuGRZ* 30 (2003), 95.

⁵⁹ See e.g. Interlaken Declaration, 1st reaffirmation of the Conference; Action Plan, lit. A para. 1; Izmir Declaration, Follow-up Plan, lit. A para. 1; Brighton Declaration, lit. C para. 13, para. 2, lit. G, para. 31.

⁶⁰ For a deeper analysis, *J. Jahn*, Ruling (In)directly through Individual Measures? Effect and Legitimacy of the ECtHR's New Remedial Power, *ZaöRV* 74 (2014), 1.

⁶¹ ECtHR [GC], *Konstantin Markin v. Russia*, Judgment of 22.3.2012, Application No. 30078/06, § 89, with further references.

⁶² See *E. Bates*, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights, Reflecting on the Convention's Evolution (From a Safeguard against Totalitarianism to Europe's Bill of Rights), 2010.

regimes that depend on a reporting system or interstate complaints often have a limited impact.⁶³ States are only intermediaries and are bound by diplomatic strategies.⁶⁴ Indeed, only few interstate complaints have been made under the Convention.⁶⁵ Moreover, by virtue of the media logic, individual cases often attract media scrutiny which may entail the positive side effect of raising political pressure to enforce Convention standards properly and swiftly. Finally, emancipating the individual from the arbitrariness of state action by granting individual redress fosters individual self-determination, strengthens the individual's autonomy and dignity and is thus correctly seen as the core of the Convention system.⁶⁶

b) Justice beyond the Individual Case – A Constitutional Role for the Court?

However, set against the backdrop of World War II, the Convention system was originally seen as a multilateral treaty that would preserve democracy and the rule of law in Europe. The Court was meant to develop and enforce the European minimum standard of human rights, thereby advancing a greater unity between the Convention states.⁶⁷ Only the submission to the interstate complaints' jurisdiction was obligatory and only a Convention state or the European Commission of Human Rights (EComHR) could refer cases to the Court.⁶⁸ Although no restrictions apply to the admissibility of an interstate complaint, practice has shown that they were only made with respect to legal questions of fundamental importance for the development of Convention law, expansive human rights violations and in

⁶³ For an account of this problem, see *C. Benelhocine*, *The European Social Charter*, 2012; not without cause was the reporting mechanism complemented by a collective complaints system, which has, since its adoption in 1998, led to 103 complaints.

⁶⁴ *C. Tomuschat* (note 58), at 96 et seq.

⁶⁵ See the list of inter-state applications, available at <<http://www.echr.coe.int>>.

⁶⁶ *A. Peters*, *Jenseits der Menschenrechte*, 2014, reconstructs public international law beyond human rights from the perspective of the individual's pursuit to autonomy and self-determination, ascertaining that, as a matter of customary law, human beings have become the primary international legal persons.

⁶⁷ This is stipulated in the preamble as one of the aims of the Convention.

⁶⁸ An individual complaint procedure was possible if it was recognized by the states (Art. 25 ECHR(1950)); still, the individual had no *locus standi* before the Court (Arts. 44, 48 ECHR (1950)), the case had to be brought before the Court by the EComHR or a Convention state; in 1990 Prot. 9 granted the individual to seize the Court, if accepted by the respective Convention state, and in 1994 Prot. 11 rendered the jurisdiction for individual complaints mandatory and abolished the EComHR.

cases with major political implications.⁶⁹ It can thus be concluded that originally the Court fulfilled a constitutional function in the sense of *Wildhaber's* “standard setting interpretation”. Resonating with the preamble and in the absence of ECHR stipulations to the contrary,⁷⁰ the Court continues to fulfil this function – also with respect to the individual complaint procedure. Several developments demonstrate that the Convention states have embraced and both the Court and the CoE’s political organs have promoted a constitutional justice approach for individual complaint procedures, departing from the Court’s self-imposed restriction to strictly decide on a case-by-case basis.⁷¹ For a long time, the lack of a fully-fledged advisory competence was one of the main arguments against the recognition of a constitutional function of the Court.⁷² While the 2nd Prot.⁷³ established an advisory jurisdiction on “legal questions concerning the interpretation of the Convention and the Protocols thereto” (Art. 47 (1) ECHR),⁷⁴ Art. 47 (2) ECHR prevents that an advisory opinion extends to legal questions that might potentially be subject to the Court’s contentious jurisdiction.⁷⁵ Hence, the scope of the competence is very narrow.⁷⁶ The underlying rationale is to avoid that the advisory jurisdiction curtails the “primary” contentious jurisdiction.⁷⁷ The Court’s “twin role”⁷⁸ of acting as a bulwark of the individual’s human rights and as an authoritative interpreter of generally

⁶⁹ *J. Meyer-Ladewig* (note 36), Art. 33, Rn. 2.

⁷⁰ Neither Art. 19 nor Art. 1 ECHR limit the Court’s competence to delivering individual justice.

⁷¹ For a similar assessment, see *J. Christoffersen*, Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?, in: *J. Christoffersen/M. R. Madsen* (eds.), *The European Court of Human Rights Between Law and Politics*, 2011, 183.

⁷² Cf. *J. Christoffersen* (note 71), 188, 190.

⁷³ On 6.5.1963 the Protocol was opened for signatures, on 21.9.1970 it came into force.

⁷⁴ The Committee of Ministers has to apply with a majority vote for an opinion.

⁷⁵ Art. 47 (2) ECHR: “Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms [...] of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.”

⁷⁶ So far, the Court has only rendered two advisory opinions; it is anticipated that the practical relevance will remain limited in the future, see *J. Frowein*, in: *J. Frowein/W. Peukert* (eds.), *Europäische Menschenrechtskonvention Kommentar*, 2009, Art. 47 para. 1.

⁷⁷ Explanatory Report to Protocol 2, ETS No. 44, para. 9 et seq., available at <<http://conventions.coe.int>>; *J. Meyer-Ladewig* (note 36), Art. 49. This rationale generally structures the delimitation of the advisory jurisdictions from the contentious jurisdictions of international tribunals. The IACtHR constitutes an exception in this respect, as the advisory opinion was stipulated to attract member states to subject issues to the Court’s jurisdiction. For the ECtHR, however, the impetus is to reduce the workload, which makes a comparison fruitless.

⁷⁸ Cf. Brighton Declaration, lit. G 35 c); *Konstantin Markin v. Russia* (note 61).

applicable Convention standards was thus recognized all along and has now been strengthened with respect to the “secondary task” by the agreement on the new advisory jurisdiction.⁷⁹ Art. 1 (1) Prot. 16⁸⁰ seeks to limit the opinions to cases which raise questions of fundamental importance for the ECHR’s interpretation or application and may thus contribute to the development of the Convention’s normative vision.

At the national level, the Convention states have furnished the ECHR a (supra-)legislative or even (supra-)constitutional status, making it a source of guiding rules and principles.⁸¹ Furthermore, rather than considering the payment of compensation a sufficient remedy, the Convention states have increasingly taken the Court’s judgments as triggers for changing their laws, even for embarking on general law reforms.⁸²

Concerning the Court’s practice, the following developments indicate the incremental “constitutional justice shift”: the creation of the pilot judgment procedure,⁸³ the identification of a quasi *erga omnes* effect of the Court’s judgments,⁸⁴ the reiteration of established general principles in the Court’s

⁷⁹ As clearly expressed in the official documents, see (note 40).

⁸⁰ The provision was inspired by Art. 43 II ECHR (referral to the Grand Chamber), Explanatory Report Protocol 16, Art. 1 para. 9 which requires a “serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance”. In the Court’s practice, a serious question of interpretation arises if an important legal issue is raised that has not been decided, if a chamber deviates from preceding case-law and if the response implies a judgment that may significantly develop the ECtHR’s jurisprudence by generating guiding principles that are likely to gain importance beyond the single case. Moreover, a serious question encompasses questions of fact to the extent that they may be generalized. A serious question of application of the Convention is assumed if the respective judgment is likely to demand a significant change of domestic legal provisions or of an administrative practice. Furthermore, a serious question of general interest comprises salient political or economic issues; see *J. Meyer-Ladewig* (note 36), Art. 43 paras. 8-10. In its Reflection Paper (note 15), III 3, paras. 30-31 the Court gives examples of admissible requests.

⁸¹ See generally for the incorporation of the ECHR into the different domestic legal systems, *H. Keller/A. S. Sweet* (eds.), *A Europe of Rights: The Impact of the European Convention on Human Rights on National Legal Systems*, 2008 and specifically for the process of “constitutionalisation by incorporation”; *H. Keller/A. S. Sweet*, *Assessing the Impact of the ECHR on National Legal Systems*, in: *H. Keller/A. S. Sweet*, *A Europe of Rights* (note 81), 682.

⁸² *A. S. Sweet* (note 45), 10.

⁸³ *W. Sadurski* (note 48), 402 et seq., 449 et seq.

⁸⁴ ECtHR, *Ireland v. United Kingdom* (note 32), § 154; Interlaken Declaration, Action Plan, lit. B para. 4 c); domestic authorities are thus obliged to find orientation in ECtHR judgments (“Orientierungswirkung”), see e.g. *A. Peters/T. Altwicker*, *Europäische Menschenrechtskonvention*, 2012, 292 et seq.

judgments before engaging in the concrete examination of a case,⁸⁵ the development of the European consensus doctrine to justify the finding of common European principles and to reduce the margin of appreciation,⁸⁶ the review of cases where the individual interest has ceased to exist, because the question at issue is of general interest for the European public order,⁸⁷ and finally the judicial classification of the ECHR as a “constitutional instrument of the European public order”.⁸⁸ Consequently, the Court is not limited to finding breaches and to affording an adequate remedy to the individual in each single case. Instead, the Court has shifted “to elucidat[ing], safeguard[ing] and develop[ing] the rules instituted by the Convention”⁸⁹ and to identifying structural and systemic defects of the domestic laws to prompt and guide respective law reforms. This is done in pursuit of the Convention’s “secondary” purpose to “determine issues [...] in the common interest, thereby raising the general standards of protection of human rights [...] throughout the community of the Convention states”.⁹⁰

Other developments demonstrate the attempt to increasingly screen applications with respect to their importance for the development of Convention law: institutionally, the establishment of new “filtering mechanisms”, such as the committee and single-judge formations (Rules of the Court 27 and 27A),⁹¹ which avoid bulks of cases coming to a Chamber or the Grand Chamber; procedurally, the bundling of cases which raise the same legal questions⁹² and the prioritization of crucial cases;⁹³ materially, the narrowing of admissibility criteria.⁹⁴

⁸⁵ This bears some similarity to part C.I. of a FCC judgment which has been called the standard setting part by O. Lepsius, *Die maßstabsetzende Gewalt*, in: M. Jestaedt/O. Lepsius/C. Möllers/C. Schönberger (eds.), *Das entgrenzte Gericht*, 2011, 159.

⁸⁶ See e.g. ECtHR, *Sunday Times v. The United Kingdom (No. 1)*, Judgment of 26.4.1979, Application No. 6538/74, § 59; G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Its Legitimacy*, 2012, available at SSRN, <<http://ssrn.com>>.

⁸⁷ *Konstantin Markin v. Russia* (note 61), (resolution of the subject matter due to later satisfaction); further cases in this respect are *Guzzardi v. Italy*, Judgment of 6.11.1980, § 86, Series A No. 39 (proceedings became devoid of object); ECtHR, *Karner v. Austria*, Judgment of 24.7.2003, Application No. 40016/98, § 26 (death of applicant).

⁸⁸ *Loizidou v. Turkey* (note 50).

⁸⁹ See *Konstantin Markin v. Russia* (note 61).

⁹⁰ See *Konstantin Markin v. Russia* (note 61).

⁹¹ For the proposal to increasingly transfer decisions to the committees, see Brighton Declaration, lit. D f).

⁹² Rule 42 Rules of Court; Brighton Declaration, lit. D para. 20 a) ii).

⁹³ Rule 41 Rules of Court; Interlaken Declaration, Action Plan lit. E para. 10 b), encourages the Court to pursue its policy of identifying priorities for dealing with cases; Izmir Declaration, Conference Statement No. 2; Brighton Declaration, lit. C para. 14; D para. 20 a) i).

⁹⁴ Cf. Art. 35 (3) b ECHR / *de minimis non curat praetor*.

In fact, the trend of turning towards a constitutional justice approach does not come as a surprise. By the end of September 2014, the Court still suffered from a backlog of approximately 85,000 cases.⁹⁵ In 2013 the Committee of Experts on the Reform of the Court stated that at the present rate it would take about ten years to close the current stock of cases, even if no new cases were to arrive.⁹⁶ A Court which is suffocating from individual complaints cannot meet its responsibility of delivering individual justice. Alternatively, a Court that can concentrate on the important cases could make its judgments in a better reasoned and timelier fashion.⁹⁷ The case-law's coherence, consistency and legal certainty could be improved by clear guiding principles.⁹⁸ Domestic authorities, particularly the courts, would be given assistance in fulfilling their legal obligation to act in conformity with and implement the Convention law.⁹⁹ Thus, in accordance with the principle of subsidiarity the domestic courts' role as primary guarantors of human rights would be buttressed. Meanwhile, pilot procedures are frequently used to process large groups of identical cases that derive from the same underlying problem.¹⁰⁰ They have effectively prompted law reforms and helped to raise the general standards of human rights protection in the respective countries,¹⁰¹ a task that has become unavoidable after enlargement.¹⁰² Pursuing the same intention to give guidance on questions of principle, advisory opinions also bear the potential to effectively tackle structural and systemic deficiencies of domestic laws.¹⁰³ Beyond the consultative

⁹⁵ In 2013 41,000 cases were repetitive cases, i.e. cases "relating to a structural or general problem already raised before the Committee of Ministers in one or several leading cases", Draft CDDH Report, DH-GDR(2013)R4 Addendum I, 7.6.2013, II. 7.

⁹⁶ Draft CDDH Report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, GT-GDR-E(2013) R2 Addendum I, 19.9.2013, I. 2. iii., available at <<http://www.coe.int>>.

⁹⁷ Delivering justice requires delivering it in due time by the Court's own standards, cf. ECtHR [GC], *Kudła v. Poland*, Judgment of 26.10.2000, Application No. 30210/96, § 156.

⁹⁸ "[A] case-law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of each judgment and the precise contents of the Court's doctrine", Judge *Martens* in ECtHR, *Fischer v. Austria*, Judgment of 26.4.1995, Application No. 16922/90, § 16.

⁹⁹ This is why Judge *Martens* found the restriction to decide on a strict case-by-case basis inappropriate, *Fischer v. Austria* (note 98), § 16.

¹⁰⁰ See the overview of pilot judgments in the Court's factsheet from October 2013, available at <<http://www.echr.coe.int>>.

¹⁰¹ This is shown in the "follow-up" category of the Court's factsheet on pilot judgments (note 97).

¹⁰² *R. Harmsen* (note 52), 32 et seq.; *W. Sadurski* (note 48), 403 et seq.

¹⁰³ In its Reflection Paper (note 15) the Court states that "the procedure would thus allow the Court to adopt a larger number of rulings on questions of principle and to set clearer

function, the constitutional justice approach capacitates the ECtHR to engage in a dialogue on European “constitutional or guiding principles” with the highest domestic courts. This may further the quality and the coherence of European human rights jurisprudence. The assertion of the Court’s constitutional function will further add to the Court’s role as external control organ for the domestic authorities’ human rights abidance. By contributing to the system of checks and balances within the European court-network, it would bolster the legitimacy of international human rights protection.¹⁰⁴ Thus, it is not only realistic to acknowledge but also normatively desirable – from the perspective of the individual, seeking effective, coherent and high quality human rights protection – to further develop the ECtHR’s constitutional function. In the near future it will be crucial, however, to further define and delimit the envisaged constitutional role, in order to avoid running the risk of interpreting the Convention in an overly broad fashion which may illegitimately predetermine domestic political processes.

c) Dismantling the Alleged Dichotomy of the Two Approaches

One aspect should be added to this discussion: Considering the individual-constitutional-justice dichotomy in detail, the divide is not as deep as often purported. The Brighton Declaration sets out that it is crucial for the future role of the Court to assess how the judicial organ can best satisfy its “twin role”: guaranteeing individuals’ rights on the one hand and fulfilling its function as the authoritative interpreter of the Convention on the other hand.¹⁰⁵ Individual justice in itself only means that effective legal redress is granted. It does not mean, however, that no techniques or complementary procedures may be developed which aim at inducing general principles out of single cases. In fact, individual justice is logically dependent on constitutional justice since structural and systemic problems impede exhaustive and effective individual redress. The constitutional justice approach may thus

standards for human rights protection in Europe”, para. 5; cf. also *A. Peters/T. Altwicker* (note 84), 285.

¹⁰⁴ See *A. Voßkuhle*, *Pyramide oder Mobile?*, EuGRZ 41 (2014), 165, at 167, regarding the EU’s accession to the ECHR. The thought is transferrable as the advisory procedure will be an additional mechanism to the individual complaint procedure to exert external control concerning human rights, resonating with the idea of a global constitutionalism. Specifying the concept, *A. Peters* (note 49), 583.

¹⁰⁵ Brighton Declaration, lit. G. 35. c); Group of Wise Persons Report (note 3), Context, I, para. 24, maintaining a concurrent role of individual supervision and a constitutional “mission”; *Konstantin Markin v. Russia* (note 61).

boost individual justice at the national and regional level. This is also the underlying rationale of the pilot procedures. They are thus exemplary for the approaches' possible coexistence and their interdependence. *Vice versa*, the individual complaint procedure serves the purpose of identifying and alleviating the deficiencies of human rights protection at the domestic level and of raising the general standard of human rights protection in Europe, thereby serving constitutional justice.¹⁰⁶ In short, both concepts are interrelated and complement each other.

d) The Effect and Implications of Applying Both Approaches to the Same Subject Matter

Since the time was not ripe to achieve the political compromise to go all the way with the constitutional justice approach and change the Convention to make the advisory opinions binding,¹⁰⁷ the Protocol attempts to synthesize the two approaches by stipulating that the advisory procedure does not *per se* exclude a subsequent individual complaint on the same subject matter.¹⁰⁸ In practice though, the workload will force the Court to cut down on accepting subsequent individual complaints. Most likely, the Court will develop restrictive interpretations of the admissibility criteria¹⁰⁹ or simply refer to the opinion in a subsequent individual complaint. Individual justice will thus generally yield to constitutional justice after an advisory opinion

¹⁰⁶ L. Wildhaber, *Eine verfassungsrechtliche Zukunft* (note 41), 573; Wildhaber's approach has also been supported by former Court presidents R. Ryssdal, J. P. Costa, P. Mahoney (present Judge/former registrar) and others, see S. Greer/L. Wildhaber (note 46), 674.

¹⁰⁷ In accordance with the idea of individual justice and the principle of subsidiarity the individual is meant to have the full domestic remedial structure which presupposes that the highest court can take its decision without the ECtHR's strict guidance on the specific case, J. Meyer-Ladewig (note 36), Art. 35 para. 7. A binding decision would effectively preclude a subsequent individual complaint procedure, cf. Art. 35 (2) b and J. Meyer-Ladewig (note 36), Art. 35 para. 37 for the similar case of a repetitive individual complaint. Indeed, a binding nature was favoured by some ECtHR judges, ECtHR Reflection Paper (note 15), III. 1., para. 24, yet this would have required an amendment of the ECHR, since all protocols that have revised procedures, as enshrined in the ECHR, required the ratification by all Convention states to come into force, A. Peters/T. Altwicker (note 84), 6, para. 20; ascertaining a violation of the principle of subsidiarity for a binding instrument: Interlaken Declaration, 2nd reiteration of the Conference; Izmir Declaration, para. 5; Brighton Declaration, para. 3, lit. B paras. 11, and 12 a), 3, that is also why the EU's preliminary reference procedure was not "transplanted", Group of Wise Persons Report (note 3), para. 80.

¹⁰⁸ Art. 5 para. 26 Explanatory Report Protocol 16; ECtHR Reflection Paper (note 15), III. 6. paras. 45-46; Opinion of the Court (note 6), para. 12.

¹⁰⁹ Cf. the Explanatory Report, Art. 5 para. 26; reference could be made to Art. 35 para. 2 lit. b ECHR; J. Meyer-Ladewig (note 36), Art. 35 para. 38 or to Art. 37.

was delivered. However, for the purpose of preserving the delivery of individual justice in cases of serious human rights violations, the Court may proceed like the IACtHR and refuse to accept a request for an advisory opinion if this forestalled the decision of an important individual complaint.¹¹⁰ Additionally, it could, albeit in narrow limits, allow a reopening of the procedure in exceptional circumstances.¹¹¹

Yet, one procedural shortcoming remains. While it is emphasized in the Explanatory Report to Prot. 16 that the individual should be heard in advisory proceedings, the decision is left within the Court president's discretion. In order to conform to a basic idea of individual procedural justice,¹¹² however, the individual who initiated the domestic proceedings should be entitled to make his or her submissions to the Court.¹¹³

3. The Resurrection of the Pyramid or the Reinforcement of the Network Structure?

While generally desirable, an overly strong role of normative guidance might irritate the relationship between the ECtHR, domestic apex courts and the CJEU by resurrecting the hierarchical pyramid concept.¹¹⁴ An obligation to seek advice or the opinions' binding force could have this adverse effect. The Convention states abstention in this regard underlines that the ECtHR's constitutional role is meant to aim at a soft and subversive "do-

¹¹⁰ See e.g., IACtHR, "Other treaties" subject to the consultative jurisdiction of the Court, Advisory Opinion OC-1/82 of 24.9.1982, § 31, Series A No. 1; IACHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13.11.1985, § 22, Series A No. 5.

¹¹¹ Cf. *J. Meyer-Ladewig* (note 36), Art. 35 paras. 37-38, but only if new relevant facts surface or if the domestic court failed to correctly apply the elaborated ECHR standards.

¹¹² For the concept, see *J. Thibaut/L. Walker*, *Procedural Justice: A Psychological Analysis*, 1975 and *T. R. Tyler*, *Procedural Justice and the Courts*, *Court Review* 44 (2007-2008), 26, at 30; the concept was transferred to the ECtHR by *E. Brems/L. Lavrysen*, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, HRQ 35 (2013), 176.

¹¹³ Art. 3 Explanatory Report Protocol 16 underlines that "it is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the procedure", para. 20, thus rightly seeking to ensure the affected individual's participation.

¹¹⁴ *A. Voßkuhle* (note 104), seeing the compound being symbolized rather by a mobile than a pyramid, he sees this risk arising from the formalization of the ECtHR's and CJEU's relationship due to the EU's accession to the ECHR, at 167. This risk could be exacerbated by the introduction of a new advisory procedure. Cases of domestic courts' non-compliance with ECtHR judgments underpin the Convention states' rejection to being absorbed into a hierarchy of multi-level human rights protection.

mestification” of Convention law through an institutionalized dialogue between equals.¹¹⁵ Having the ECtHR and the domestic courts meet at eye level alleviates concerns about the Court’s lacking democratic legitimacy and about reducing the diversity of the Convention states’ different legal systems.¹¹⁶ Ultimately, the development of the courts’ relationship will depend on the frequency and the manner of their use of the advisory jurisdiction. To preserve heterarchical and coordinative network structure, the domestic courts will have to conscientiously engage with the Court’s advisory opinions, not simply applying them to their specific contexts in a spirit of anticipatory obedience.

Preserving a balance within the compound structure is also crucial vis-à-vis the CJEU. In view of the advisory procedure’s non-obligatory and the opinions’ non-binding nature the provisions allow the delimitation of the two jurisdictions in a way that preserves the respect for the principle of autonomy of EU law.¹¹⁷ However, concerns have been voiced in this respect.¹¹⁸ Indeed, for the time after the EU’s accession to the ECHR the Protocol provides for the ratification by the EU,¹¹⁹ but it does not attribute an exclusive or prioritized position to the CJEU’s preliminary reference procedure in cases of EU- and ECHR-law-relevance pending before domestic apex courts. With respect to human rights issues, the advisory procedure could thus reinforce the ECtHR’s interpretive authority for the European

¹¹⁵ Also the official papers underline that it is in the nature of a dialogue that the requesting court should be free to decide on the effects of an advisory opinion in the domestic proceedings, Opinion of the Court (note 5), para. 12. Art. 1 (3) reflects the aim of the procedure to give guidance on the Convention issues and not to transfer the dispute to the ECtHR, see Explanatory Report Protocol 16, § 11.

¹¹⁶ The Court has also explicitly mentioned the democratic deficit of ECtHR judgments and elaborated why this demands deference, thus narrowing the ECtHR’s scope of judicial review, ECtHR [GC], *Animal Defenders International v. the United Kingdom*, Judgment of 22.4.2013, Application No. 48876/08, para. 111 with further references.

¹¹⁷ The Court argues in its Reflection Paper that the non-binding nature could serve to guarantee the respect of the principle of autonomy of EU law (note 15), para. 10.

¹¹⁸ S. Ø. Johansen, Some Thoughts on the ECJ Hearing on the Draft ECHR Accession Agreement, <<http://obykanalen.wordpress.com>>, reporting from the CJEU hearing on the Draft Agreement on the Accession of the EU to the ECHR. President Skouris underlines this point with a potential case where an advisory request could be made regarding a regulation, the ECHR-compatibility of which is questioned, before or alongside a preliminary reference procedure.

¹¹⁹ The protocol’s preamble refers to the “member States of the Council of Europe and other High Contracting Parties to the Convention”; see the Provisional Version of the Report on the Draft Protocol No. 16 by the Committee on Legal Affairs, Provisional Version, Rapporteur C. Chope, AS/Jur (2013), 21, at B. 3.2., available at <<http://www.assembly.coe.int>> and the critical remark that this was not specified in the Explanatory Report of Protocol 16.

public order of human rights as against the CJEU's.¹²⁰ However, the CJEU will retain the final say on the interpretation of Union law¹²¹ and internal EU rules may satisfactorily regulate the behaviour of highest domestic courts in such cases in order to avoid conflicts of competence between the CJEU and the ECtHR.¹²² If used as a mechanism for the specialized courts to cooperate regarding the development of fundamental European human rights and rule of law principles¹²³ and not as a tool to reinvigorate diffuse claims to power, Prot. 16 will not tilt the balance of the network of ECtHR, CJEU and the highest domestic courts.

IV. Conclusion

The Protocol bears the potential to strengthen the Court's role as human rights adjudicator within the European constitutional courts compound by reinforcing its function to give normative guidance on legal matters of general importance for the Convention, particularly on structural problems. It signifies a paradigm shift towards a constitutional role for the Court which is an adequate response to the ECHR's incremental constitutionalisation. Neither does this development deprive or relocate the Convention's core. Instead, it reveals the recognition of both concepts as core to the Convention and as constituents of the Court's twin role.

By institutionalizing the constitutional dialogue between the ECtHR and the highest domestic courts, the Protocol delivers a new formal mechanism

¹²⁰ After *Åklagaren v. Hans Åkerberg Fransson*, CJEU, 26.2.2013, C-617/10 the need might have been felt to reassert the ECtHR's position as authoritative European human rights adjudicator, see *A. Voßkuhle* (note 104), 167.

¹²¹ Art. 19 (1), 2nd subpara. TEU. Notably, the CJEU is already bound under Art. 52 (3) Charter of Fundamental Rights and Art. 6 (3) TEU to apply the ECtHR's case-law when interpreting the fundamental rights provisions of Union law. Art. 6 (2) TEU also reveals the member states' decision to submit the EU to the ECHR and thus to the ECtHR's interpretative authority regarding human rights. The standard of human rights protection of the EU Charter of Fundamental Rights may not be undermined by the ECtHR, see Art. 53 ECHR.

¹²² Already Art. 267 (3) TFEU, Art. 4 (3) TEU and the relevant case-law (*CILFIT*, *Simmenthal II*, *Foto Frost*) may oblige domestic courts to prioritise the preliminary reference procedure or to seek it anew, once the ECtHR has questioned the ECHR-compatibility of a Union act. For a discussion with further justificatory approaches, see the discussion on *Verfassungsblog*, amongst others *T. Streinz*, *Forum-Shopping zwischen Luxemburg und Strasbourg?*, 17.6.2014, available at <<http://www.verfassungsblog.de>>.

¹²³ General principles of human rights interpretation will more likely be used as a legal reference in cases concerning European Charter rights or the European rule of law, cf. *J. A. Frowein*, *The Guarantees Afforded by the Institutional Machinery of the Convention* (note 18), 299.

to foster the interaction between the courts. Consequently, the Convention will become more entrenched in the domestic court structure which may foster domestic compliance and thus help to consolidate the ECHR's viability. Additionally, the Protocol serves as a mechanism that facilitates material coordination concerning "constitutional principles", hence furthering the coherence of the European human rights jurisprudence.

The Protocol will not rid the Court of its backlog in the near future. Yet, the advisory procedure may capacitate the ECtHR to effectively deal with the source of structural and systemic problems and thus to dispose of a great amount of repetitive applications which would help reduce the Court's workload in the longer term.¹²⁴

Ultimately, Prot. 16 may further serve as an additional external control mechanism within the network of European constitutional courts which serves to boost the legitimacy of the judicial human rights protection in Europe.

Once having come into force, the procedure's success will depend on its use by the highest domestic courts and the CJEU. Considering the benefits which the Protocol may bring, it seems indispensable that the Protocol's potential be realized by the decisive actors.

¹²⁴ Some authors have argued that a European Supreme Court should be created in addition to the existing ECtHR for the sake of its relief, see *L. Wildhaber* (note 51).