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Review article

PROTOCOL NO. 16 TO THE ECHR IN SERBIA? PRO ET CONTRA*

Two frogs dwelt in the neighborhood, one in a vast marsh, and the other by the roadside in a small pond. "Come to me," said the frog who lived in the marsh, "here you will live more safely and comfortably, and there is plenty of food". "No!" replied the other stubbornly. "I cannot leave the place to which I have become so accustomed." A few days later, a carriage ran over her in her pond.
(Aesop, *Two Neighbour-Frogs*)

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ABSTRACT

Protocol No. 16. to the European Convention on Human Rights (ECHR) represents a new instrument in ECHR' toolkit. Entered into force on August 1, 2018 he allowed national high courts and tribunals including Constitutional Courts to request advisory opinions from the European Court of Human Rights (ECtHR) on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its protocols. Under Protocol No. 16 to the ECHR, highest national courts and tribunals may submit questions to the ECtHR on issues that are not covered by the ECtHR's existing case law or on which there is significant disagreement among the national courts of different countries. The advisory opinions of the ECtHR are not binding on the national courts but they can provide authoritative guidance on how to interpret and apply the ECHR's provisions in specific cases.

However, so far only 25 members of the Council of Europe signed and 22 members ratified them while only nine requests have been made in the four years of operation. Why? What are the advantages and disadvantages of Protocol No. 16 to the ECHR? The goal of this paper is to answer the aforementioned questions in order to answer the question of whether Serbia needs its adoption and implementation.

Keywords: *advisory opinion, ECHR, ECtHR, Protocol No. 16 to the ECHR, Serbia*

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1. INTRODUCTION TO THE PROTOCOL NO. 16 TO THE ECHR

The European system for the protection of human rights has undergone a far-reaching reform. The highest national courts and tribunals, including Constitutional Court(s), when encountering difficulties in applying the European Convention on Human Rights (hereafter: ECHR, European Convention), now have the ability to seek advisory opinions from the European Court of Human Rights in Strasbourg (hereafter: ECtHR, European Court in Strasbourg). This measure has the potential to significantly impact not only the functionality of the national legal systems of Council of Europe (hereafter: CE) member states but also the overall system itself - although its ultimate utility remains to be seen. In the end, there is also a shared objective - relieving the ECtHR or, in other words, prevention instead of intervention.

What happened? Protocol No. 16 to the ECHR (hereafter: P 16 ECHR or Protocol) was endorsed by the Committee of Ministers of the CE on 10 July 2013 and has been available for signing by the High Contracting Parties since 2 October 2013. By legal nature, this protocol is optional and becomes effective only for those parties that have ratified it, after ten ratifications have been completed[1]. The tenth ratification occurred recently, by France on 12 April 2018. As per its article 8, the P 16 ECHR came into force for the concerned states on 1 August 2018. Until now, the P 16 ECHR has been ratified by (only) 22 of the 46 member states of the CE and 2 out 5 members of region of Western Balkans.[2]

As early as 2006, the possibility of expanding the restricted jurisdiction of the Court in advisory matters was mentioned in the so-called Wise Persons' Report.[3] The determination of the highest officials of the Council of Europe to implement such a reform was reiterated in Interlaken in 2010, Izmir in 2011 and then confirmed in Brighton in 2012 at three conferences dedicated to the future of the ECtHR.[4] The impetus behind the reforms, initiated over a decade ago, pri-

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1 According to art. 8 of P 16 ECHR, the Protocol would enter into force the first day of the month following the expiration of three months after the date on which ten states have expressed their consent to be bound by it.

2 In the Western Balkans, Protocol has been ratified by Montenegro and Bosnia and Herzegovina. Complete list of all CE member states that have ratified P 16 ECHR available at: Council of Europe, Protocol No 16, 2024, [https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214], Accessed 9 March 2024.

3 Council of Europe, *Report of the Group of Wise Persons to the Committee of Ministers*, [https://rm.coe.int/16805d6a73], Accessed 9 March 2024.

4 Lemmens, K., *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?,* European Constitutional Law Review Vol. 15, No, 4, 2018, pp. 693-694. For more details about those

marily stemmed from the European Court of Human Rights' burdened caseload and, consequently, the prolonged average duration for processing applications, along with the significant volume of applications addressing systemic violations.[5] In Zampetti's words, "the aim of the protocol is to avoid future violations of the ECtHR (and thereby cases before the European Court of Human Rights – A.N.) through preventive intervention."[6] It is evident from this that P 16 ECHR serves not only a practical but also a substantive purpose, namely, to alleviate the substantial backlog of applications and to enhance and fortify the dialogue between superior national courts and the ECtHR, as stated by Žuber and Lovšin.[7] This substantive aim is further underscored in the preamble of the Protocol, which asserts that "the expansion of the Court's competence to provide advisory opinions will further promote the interaction between the ECtHR and national authorities and thus bolster the implementation of the ECHR, in line with the principle of subsidiarity."

This paper will focus on attempting to identify some weaknesses and strengths of this document in light of its main goals, which place it among efforts aimed at enhancing the long-term effectiveness and efficiency of the human rights protection system in Strasbourg. In this regard, in a brief introduction, we have first acquainted ourselves with some basic information about the development of the protocol, and we will then (to a reasonable extent) address the legal nature of P 16 ECHR, in order to assess whether the adoption of this document would be desirable (and even possible) in Serbia.

2. BRIEF LEGAL ANALYSIS OF THE PROTOCOL NO. 16 TO THE ECHR

2.1. Procedure

In this chapter of the paper, we will address several important procedural questions. Firstly - who can request an advisory opinion from the ECtHR, secondly - who makes the decision, and finally - why is it an advisory (rather than binding) opinion?

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three conferences see: Krstić, I.; Marinković, T., *Evropsko pravo ljudskih prava*, Savet Evrope, Strazbur, 2022, pp. 102-104.

5 Žuber, B.; Lovšin, Š., *Judical Dialogue in the light of Protocol No. 16. to the European Convention of Human Rights*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 2, 2019, p. 901.

6 Zampetti, G., *The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection*, [https://www.econstor.eu/bitstream/10419/185058/1/1040654460.pdf], Accessed 10 March 2024.

7 Žuber, B., Lovšin, Š., *op. cit.*, note 5, p. 901.

Art. 1, para. 1 of the Protocol provides that highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Simultaneously, Art. 10 of the Protocol specifies that each High Contracting Party to the European Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance, or approval, by means of a declaration addressed to the Secretary-General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Art. 1, para. 1, of this Protocol. This declaration may be modified at any later date and in the same manner. In this regard, it is necessary to highlight two important points. Firstly, "the drafters wanted to respect the particularities of each national legal order,"[8] as they left the possibility for the signatory states of the Protocol to choose (and later modify) the courts empowered to address the ECtHR. In other words, "this leaves the parties to the Protocol with discretion in choosing between their main courts and tribunals – determining which of them is, or which of them are the most appropriate for such a role."[9] However, "the Protocol does not specify whether there is any control by the European Court over the choice made by a State", as noted by William Schabas.[10] Secondly, "the creators of the Protocol insisted that these should be (the) highest courts in the country," aiming to avoid overburdening the ECtHR, as one of the goals of Protocol 16 is precisely to increase the efficiency of the ECtHR.[11] In other words, the aim of the creators of the Protocol was to prevent the proliferation of requests, which is consistent with the idea of exhaustion of domestic remedies.

Art. 2, para. 1-2 of the P 16 ECHR provide that a panel of five judges from the Grand Chamber will decide whether to accept the request for an advisory opinion, taking into account Article 1 of the P 16 ECHR. The Grand Chamber is defined in article 26 of the European Convention.[12] The panel must provide reasons for

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8 Lemmens, K., *op. cit.,* note 4, p. 696.

9 Jóźwicki, W., *Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?,* Kużelewska, E.; Kloza, D.; Kraśnicka, I.; Strzyczkowski, F. (eds.), European Judicial Systems as a Challenge for Democracy, European Integration and Democracy Series, Antwerp, 2015, p. 188.

10 Schabas, W., *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford, 2015, p. 1215.

11 See. Explanatory Report to Protocol No. 16. to the ECHR, para. 8, pp. 2-3.

12 "To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time […] There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party

any refusal to accept the request. The advisory opinion demand a majority vote of the members of the Grand Chamber. According to Art. 4 of P 16 ECHR, in the absence of unanimity, a judge may issue a separate opinion.[13] The Court is obliged to deliver the advisory opinion not only to the court which has submitted the request, but also to the State Party whose national authority has submitted the request. Here, two potential issues arise - the undefined timeframe within which the ECtHR should make a decision and consequently, the delay in proceedings before domestic courts. The ECtHR has adopted a legal standard whereby requests for advisory opinions will be treated as a priority, meaning decisions will be made within the shortest possible timeframe.[14] At the end, Art. 2, Para. 3 of the P 16 ECHR provides that the panel and the Grand Chamber shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge. "The intent of the drafters was that the procedure be identical to what already exists under Art. 26. Para. 4. of the ECHR, and that the list of candidates be the same," states Schabas.[15]

At the conclusion of these brief procedural debates, Art. 5 of the P 16 ECHR succinctly emphasizes that the opinion of the ECtHR is not binding. Although advisory opinions would not have a direct impact on future applications, they would constitute part of the Court's jurisprudence, alongside its judgments and decisions. This implies that it would be reasonable to expect that the interpretation of the ECHR and its protocols would have a similar effect in advisory opinions as interpretative elements established by the Court in its judgments and decisions.[16] At first glance, "The Protocol appears concise or perhaps even silent regarding the effects of the opinions. The actual direct and indirect effects of advisory opinions will likely only be observable and assessable after some practice has developed," notes Jóźwicki.[17] After all, the aim of non-binding opinions is to strengthen domestic implementation of the ECHR, that is, to harmonize interpretation between the ECtHR and domestic courts and tribunals.

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concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge."

13 For more details see. Đorđević, S., *Protocol 16 to the European Convention on Human Rights and Freedoms*, Facta Universitatis: Series Law and Politics, Vol. 12, No, 2, 2014. p. 108.

14 Guidelines on the Implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the ECHR, para. 29, p. 9.

15 Schabas, W., *op. cit.*, note 10, p. 1221.

16 See Explanatory Report to Protocol No. 16. to the ECHR, para. 26-27, pp. 6-7.

17 Jóźwicki, W., *op. cit.*, note 9, p. 190.

2.2. Recent case-law

In this chapter, we will first briefly outline all the previous cases related to Protocol 16 that have come before the European Court of Human Rights in Strasbourg, and then we will provide a brief overview of the first case of an advisory opinion from 2019.

Through an examination of the ECtHR database, it has been determined that in the previous practice of the court concerning the provision of advisory opinions related to the interpretation and application of the ECHR, as established by P 16 ECHR, seven advisory opinions have been issued by the highest courts and tribunals of France, Armenia, Lithuania, Finland, and Belgium.[18] Additionally, there have been two instances where requests for advisory opinions were rejected – in 2019 (in the case of the Slovakia Supreme Court) and in 2024 (by a panel of the Criminal Chamber of the Supreme Court of Estonia).[19]

On April 10, 2019, the ECtHR in Strasbourg issued its inaugural advisory opinion on a substantive matter within the framework of the European Convention on Human Rights (ECHR). This authority was granted to the Court through Protocol 16 to the Convention. The opinion was provided in response to a request from the French Court of Cassation and pertained to a highly specific issue in family law: the acknowledgment in national law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother.

The French Court of Cassation sent its request for an advisory opinion to the ECtHR, posing two questions: first, whether the refusal by the French authorities, in the specific circumstances of the case, constitutes a violation of France's "margin of appreciation" under Article 8 ECHR, and whether the legal status of a child conceived using the eggs of the "intended mother" holds legal significance. The second question, contingent upon an affirmative response to the first question, concerns whether adoption could serve as an alternative means of complying with Article 8. In its response to the first question, the ECtHR, taking into

[18] Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR; Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR; Advisory Opinion Requested by Lithuanian Supreme Administrative Court 016-202-002 ECtHR; Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR; Advisory Opinion Requested by French Conseil d'Etat P16-2021-002 ECtHR; Advisory Opinion Requested by the Supreme Court of Finland P16-2022-001 ECtHR; Advisory Opinion Requested by Conseil d'Etat of Belgium P16-2023-001 ECtHR.

[19] Decision Requested by Supreme Court of the Slovak Republic P16-2020-001 ECtHR; Decision Requested by Supreme Court of Estonia P16-2023-002 ECtHR.

consideration the best interests of the child, examined the margin of appreciation. Regarding the first factor, it noted that the lack of recognition of the legal relationship between mother and child has a negative impact on various aspects of the child's life. The absolute impossibility of registration, as in the case of France, prevented the consideration of the situation "in light of the specific circumstances of the case".[20] Concerning the margin of appreciation, the Court observed that, from a comparative law perspective, there is no consensus, which typically leads to a wide margin of appreciation for states. However, the fact that particularly important aspects of the right to respect for private life were at stake reduced the margin of appreciation. The Court concluded at this point that "the child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law enable the recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother,'" and that this would apply "even more strongly"[21] in cases where the child was conceived using the eggs of the 'intended mother'. In response to the second question posed by the French Court of Cassation, the ECtHR concluded that alternative methods of registration in birth registers, such as adoption, may be utilized. "The child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law enable the recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'."[22] Specifically, the European Court held that the recognition of the relationship (between children and intended mother), if legally established abroad, should be possible at the latest when the relationship becomes a practical reality.[23] This should be feasible in accordance with procedures prescribed by national laws, and the implementation of such alternatives should be swift and efficient. It is then up to domestic courts to determine whether these requirements are met in a particular context.

What can we conclude from this case? In terms of the procedural aspect and its duration, the European Court of Human Rights (ECtHR) responded expeditiously, providing its advisory opinion within the shortest possible timeframe.

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20 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para. 42.

21 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para 47.

22 Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR, para 53.

23 "The ECtHR, however, explicitly distinguished situations in which children born through surrogacy lack a biological connection to either of the intended parents, thus leaving room for future jurisprudential developments in this area," stated Draškić. See. Draškić, M., *Ugovor o surogat materinstvu: između punovažnosti i ništavosti*, in: Zbornik treće regionalne konferencije o obaveznom pravu, Baretić, M; Nikšić, S. (eds.), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2022, p. 364, fn 52. See also. Barać, I, *Surrogacy – A Biomedical Mechanism in the Fight against Infertility*, Annals of the Faculty of Law in Belgrade – Belgrade Law Review, Vol. 71, No. 2, p. 273, fn. 45.

Specifically, it took only six months from the submission of the question to the response by the Grand Chamber of the ECtHR, which is noteworthy considering that most judgments of the Court typically take much longer.[24] Although one may note that by now the twin girls, born in October 2000, are now 18 year-olds – that is how long legal battles may take – on October 4, 2019, the French Court of Cassation finally ruled for the complete transcription of the Mennesson children's foreign birth certificates into French law.[25] While such an approach to recognizing the mother-child relationship may not be necessary in every instance, the Court of Cassation deemed the transcription of birth certificates more appropriate than adoption in this particular case due to the extended duration of the Mennessons' pursuit of family recognition.

Although non-binding on the Court of Cassation according to Article 5 of P16 ECHR, the advisory opinion nonetheless established a *modus operandi* for future cases before the Court, thereby exerting significant influence on French law.[26] "The response of other countries to the advisory opinion, if any, and its broader impact on cross-border surrogacy in Europe remain to be seen", states Lydia Bracken.[27]

When it comes to the character of the decision, there are authors who criticize the advisory opinion of the ECtHR. Tiffany Conein argues that in the mentioned case, "the ECtHR behaved as if it were dealing with an individual case, 'shifting from principles to facts, or solving rather than interpreting'."[28] However, wasn't this precisely the hidden motive of The French Court of Cassation? It seems to be the case. Lize Glas and Jasper Krommendijk argue that „the French court employed the *hot potato strategy*, seeking assistance from the ECtHR to address delicate and sensitive political issues in the country, thus maintaining a 'clean reputation' and avoiding conflict with political actors in the country."[29] Therefore, it appears that in this case, one of the primary objectives of the P 16 ECHR - dialogue and cooperation between the highest national courts and the ECtHR - was not achieved, as the burden of 'decision-making' was entirely shifted to the ECtHR.

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24 See, *Analysis: The Strasbourg Court's First Advisory Opinion under Protocol 16* [https://www.echrblog.com/2019/05/the-european-courts-first-advisory.html], Accessed 17 March 2024.

25 Judgement, French Court of Cassation, No. 648 4-10-2019.

26 Bracken, L., *The ECtHR first advisory opinion: Implications for cross-border surrogacy involving male intended parents*, Medical Law International, Vol. 21, No. 1, 2021. p. 8.

27 *Ibid*.

28 Conein, T, *Le protocole No 16 vu par la Convention européenne des droits de l'Homme et la Cour de Cassation*, in: Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droits de l'Homme, Strasbourg, 2019, pp. 20, 28.

29 Glas, L.; Krommendijk, J., *A Strasbourg Story of Swords and Shields: National Courts' Motives to Request an Advisory Opinion from the ECtHR Under Protocol 16*, European Convention on Human Rights Law Review, Vol. 3, No. 3, 2022, p. 334.

3. *PRO ET CONTRA* (OR *CONTRA ET PRO*) FOR THE PROTOCOL NO. 16 TO THE ECHR

In this chapter, we will explore all the arguments against and for signing and ratifying P 16 ECHR. To that end, we will examine the perspectives of leading scholars and researchers worldwide. As fundamental criteria for evaluating the (in)validity of Protocol 16, we will analyze two key dilemmas – the increase or decrease in the number of cases before the ECtHR (as set forth at the Izmir conference) and the colonization or decolonization of domestic courts and tribunals by the ECtHR.

3.1. Expansion/Reduction of cases before the ECtHR

One of the main arguments against P 16 ECHR is the potential increase in the workload of the ECtHR. The Protocol aims "to prevent future violations (and consequently cases in Strasbourg) through preventive intervention".[30] However, there is a legitimate concern that the formulation "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Art. 1, Para. 1, P 16 ECHR) could lead to the future expansion of the workload of the ECtHR, especially if it is assumed at one point that the (vast) majority of CE member states will ratify P 16 ECHR. This would disrupt not only the effective implementation of P 16 ECHR but also the ECHR itself, resulting in slowdowns and disruptions in the ECtHR's operations, which would have significant repercussions on the European human rights architecture in practice. Consequently, this would substantially impact the legal systems of states that have requested an advisory opinion at that time, as their highest courts and tribunals would be unable to proceed further. In other words, potential delays in domestic proceedings would be inevitable.

These arguments can currently be countered. Namely, the previous practice of the ECtHR did not encounter issues with an increase in the workload of the European Court in Strasbourg. The reason for this is the (still) relatively small number of signatory states to the Protocol as well as states that have ratified the Protocol. Furthermore, earlier we observed in the Guidelines on the Implementation of the advisory-opinion procedure introduced by P 16 ECHR that the ECtHR has established a legal precedent whereby requests for advisory opinions will be given priority treatment, ensuring that decisions are rendered within the shortest feasible timeframe. These Guidelines have been fully complied with so far, as the waiting time for each previous advisory opinion has been less than a year. This demonstrates that the ECtHR has proven to be a highly efficient body that has

[30] Zampetti, G., *op. cit.*, note 6, p. 10.

not compromised the issue of the speed of proceedings before domestic courts and tribunals.

3.2. Colonization/Decolonization by the external Court31

Another common argument that can be found in scholarly literature is that P 16 ECHR undermines the sovereignty of states and the independence of the domestic judiciary. Some authors argue that advisory opinions from the ECtHR pose a "risk of erosion to both the highest courts and tribunals in the country", as well as to "the fundamental constitutional principles and principles of states that have ratified Protocol 16 to the ECHR".[32] In other words, there is a colonization of the legal order of a country by the ECtHR and its vision of law.

On the contrary, "from the sovereignist' own perspective, adherence to Protocol no. 16 might even improve the position by guaranteeing greater room from manoeuvre […] and above all greater scope for negatiations with Strasbourg", states Lamarque.[33] In other words, in any proceeding related to the ECtHR, domestic courts (parties) can clearly and unequivocally express their stance. Furthermore, advisory opinions are still advisory only, meaning that they do not bind domestic courts and tribunals, and therefore "cannot jeopardize either the sovereignty of the States nor judicial discretion."[34]

Nevertheless, the fact that advisory opinions are non-binding can be used to argue that their existence is unnecessary, as they may only further burden the already overstretched ECtHR in Strasbourg, consequently delaying the proceedings before domestic courts and tribunals. In other words, advisory opinions are not only non-binding but also time-consuming, rendering them unnecessary. Furthermore, Lemmens suggests that "it is conceivable that the Strasbourg Court will have to

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31 The idea for such a subtitle arises from Lamarque's analysis of the substantive arguments against the sovereignty narrative (associated with Protocol 16). See. Lamarque, E., *The Failure by Italy to Ratify Protocol no. 16 to the ECHR. Left behind but not lost*. The Italian Review of International and Comparative Law, Vol. 1, No. 1, 2021, pp. 163-168.

32 *Ibid*., 164. For example, David Milner states that the ECtHR, on the one hand, plays an increasing role as a constitutional instrument of European public order, but that its practice in this regard leads to debates on the boundaries of the role of an international mechanism in relation to the democratic institutions of a sovereign state. See also. Milner, D., *Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road*, ZeuS, Vol. 17, No. 1, 2014, p. 50.

33 Lamarque, E., *op. cit.*, note 31, p. 164.

34 Speech by Enrico Albanesi at the ECtHR [https://www.echr.coe.int/documents/d/echr/summary-20231013-albanesi-conference-p16-eng], Accessed 20 March 2024.

consider applications related to cases for which it has previously provided advisory opinions."[35] A party involved in domestic proceedings may express dissatisfaction with how domestic courts have incorporated the opinion of the Strasbourg Court. This, we must acknowledge, does not diminish the potential tension between the highest domestic courts and tribunals and the ECtHR.

However, advisory opinions, although non-binding, bind everyone. Namely, this interesting and seemingly contradictory assertion is grounded in the fact that rejecting the interpretation of the ECtHR could amount to a failure to comply with the obligation to respect the ECHR. Specifically, "advisory opinions form part of the case-law of the Court, alongside its judgments and decisions, and in the light of which the interpretation of the ECHR and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions."[36] "Therefore, advisory opinions of the ECtHR under Protocol No. 16, although non-legally binding, legally affect all Contracting States to the ECHR, including those which have not ratified the Protocol, because they form part of the case-law of the Court, alongside its judgments and decisions, and because the case-law of the Court legally affect all the Contracting States to the ECHR," concludes Albanesi.[37] In other words, it can be said that advisory opinions achieve the effect of constitutional radiation, meaning that they are transmitted (bind) to all member states of the CE.

4. WHAT ABOUT SERBIA?

Serbia (then in a state union with Montenegro) became a member of the CE in 2004. Being one of the youngest parties to the ECHR, it came under the jurisdiction of the ECtHR at the moment when its legal and political authority had already been well established.[38] A few years later, in 2006, Serbia reclaimed its independence and adopted the current Constitution of the Republic of Serbia, incorporating all the principles of the European human rights protection framework.[39] "In the first place, it established a rich catalogue of human and minority rights and provided for the direct effect of human rights, guaranteed not only by the Constitution itself, but also by the ratified international treaties and the case

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35 Lemmens, K., *op. cit.*, note 4, p. 613.

36 Albanesi refers to this effect as the horizontal legal effect of advisory opinions under P 16 ECHR. See. Albansesi, E., *The European Court of Human Rights' Advisory Opinions Legally Affect Non-ratifying States: A Good Reason (From the Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR*, European Public Law, Vol. 21, No. 1, 2022, p. 8.

37 *Ibid.*, p. 9.

38 Marinković, T., *Serbia - Constitutional Law*, Wolters Kluwer, Alphen aan den Rijn, 2019, p. 191.

39 See. Art. 16. para. 2. of the Constitution of the Republic of Serbia.

law of international institutions which supervise their implementation", states Marinković.[40] Additionally, the confirmation of the constitutional appeal institution, previously perceived as a "constitutional ornament in Serbia"[41]. Citizens of Serbia (individuals, groups of individuals, or NGOs) have the right to protection before the ECtHR. Specifically, when all available domestic legal remedies have been exhausted, they may address the ECtHR by submitting an application for the protection of fundamental human rights if they believe they are victims of violations of rights established by the ECHR and its protocols.

For a period, Serbia was among the states with the highest number of cases before the European Court in Strasbourg, but this number has decreased in recent years.[42] According to statistics published in the Annual Report of the ECtHR for the year 2022, 3,289 applications were registered and referred to a decision-making chamber and the European Court in Strasbourg rendered 12 judgments, finding at least one violation of rights guaranteed by the Convention in 10 cases, determining no violation in one case, and reaching a settlement in one case. In 2023, the ECtHR dealt with 1,925 applications concerning Serbia, of which 1,910 were declared inadmissible or struck out. It delivered 9 judgments (relating to 15 applications), in which at least one violation of the European Convention on Human Rights was found.[43]

Regardless of the declining trend in activity before the ECtHR, the burden of the 1990s, including wars, economic sanctions, and isolation, influenced increased activity in the Constitutional Court of Serbia regarding constitutional complaints[44], all of which also affected the relationship between the Constitutional Court of Serbia and the ECtHR. Although invoking the Constitutional Court in reference to the ECHR is "considerably more frequent and satisfactory, this cannot be said for the practice of other courts in Serbia," emphasizes Plavšić.[45] However, Tanasije Marinković observes that "Serbian courts increasingly refer to the jurisprudence

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40 Marinković, T., *op. cit*., p. 192.

41 See. Nenadić, B., *O nekim aspektima odnosa ustavnih i redovnih sudova*, in: Nenadić, B. (ed.), Uloga i značaj Ustavnog suda i očuvanje vladavine prava, Ustavni sud, Beograd, 2013, p. 87.

42 Pokuševski, D. (ed.), *Ljudska prava u Srbiji*, Beogradski centar za ljudska prava, Beograd, 2023, p. 42.

43 *ECtHR Country Profile – Serbia* [https://www.echr.coe.int/documents/d/echr/cp_serbia_eng], Accessed 21 March 2024.

44 For example, the Constitutional Court of Serbia received a total of 16,075 constitutional complaints in 2022 alone, constituting 98.88% of all cases. See. *Pregled rada Ustavnog suda Srbije u 2022. godini* [https://www.ustavni.sud.rs/upload/document/pregled_2022_(1)_20230522_090003.pdf], Accessed 21. March 2024.

45 Plavšić, N., *Primena prakse Evropskog suda za ljudska prava od strane Ustavnog suda u postupcima po ustavnim* žalbama, in: Ustavna žalba u pravnom sistemu Srbije, Šarčević, E.; Simović, D., (eds.), Centar za javno pravo, Sarajevo, 2019, pp. 259-260.

of the European Court, indicating at least a formal shift of legal practice towards European values and standards embodied in the ECHR."[46] In this regard, it seems that Serbia would benefit far more from P 16 ECHR than suffer any harm. Namely, the only potential danger could be the objective impossibility for the European Court to provide advisory opinions promptly due to a significant influx of signing and ratification of Protocol 16 by other European states. Consequently, domestic courts would be unable to proceed further, with the Constitutional Court of Serbia bearing the brunt, already burdened excessively. However, considering that the number of signatories is still relatively small, and the ECtHR prioritizes advisory opinions, the Constitutional Court of Serbia would have the most benefits from ratifying P 16 ECHR, at least concerning (future) constitutional complaints or the relationship with human rights guaranteed by the ECHR. Since Serbia has committed to respecting the ECHR through its Constitution, signing the Protocol would nurture a dialogue between the highest courts in Serbia (including the Constitutional Court) and the ECtHR, with justified expectations that the European Court of Human Rights in Strasbourg would accept some arguments from our courts, thereby exerting a certain influence on our jurisprudence at the ECtHR. This would improve the quality of decision-making in our courts and enhance their reputation in Europe. Consequently, it could also lead to strengthening public trust in the activities of the Constitutional Court of Serbia, demonstrating its commitment to respecting and enforcing human rights for all. Ultimately, whether we sign and ratify Protocol 16 or not, it indirectly binds us through the ECtHR's practice.[47]. In other words, "ECtHR exercises substantial influence on the national legal systems of the States and has therefore evolved into an important promoter of common human rights standards", state Žuber and Lovšin.[48]

5. CONCLUSION

P 16 ECHR represents the product of multi-decade reforms of the European Court of Human Rights in Strasbourg. It introduces a significant novelty to European human rights law - the advisory opinion, aimed at reducing the burden

[46] Marinković, T., *Analiza uticaja odluka Evropskog suda za ljudska prava na rad Ustavnog suda Srbije*, in: Odnos Ustavnog suda i sudske vlasti – stanje i perspektive, Beljanski, S; Pajvančić, M; Marinković, T; Valić Nedeljković D. (eds.), CEPRIS, Beograd, 2019, p. 51.

[47] However, there are authors who hold a different view. Dzehtsiarou argues that advisory opinions limit the discretion of national courts, leaving difficult questions to be addressed by the European Court of Human Rights in Strasbourg. Dzehstiarou, K., Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court [https://verfassungsblog.de/advisory-opinions-more-cases-for-the-already-overburdened-strasbourg-court/], Accessed 23 March 2024.

[48] Žuber, B.; Lovšin, Š., *op. cit*., note 5, p. 909.

on the European Court in Strasbourg on one hand, and enhancing interaction, dialogue, and cooperation between national courts and tribunals and the ECtHR on the other.

Member states of the Council of Europe have largely hesitated when it comes to signing and ratifying Protocol 16. Namely, they perceive more drawbacks than benefits in it. These arguments can be divided into two groups - the first, directed towards European human rights law, suggesting that P 16 ECHR will further burden the already overloaded ECtHR with advisory opinions, and the second, focused on national law, indicating that it may further endanger the independence of the judiciary of CE member states, and slow down proceedings before domestic courts and tribunals.

However, considering the role and importance of the ECtHR in promoting human rights in Europe, it seems that the reasons for signing and ratifying Protocol 16 outweigh the drawbacks. Namely, "The European Court in Strasbourg increasingly resembles a supranational constitutional court, with a firmer anchor in the domestic legal systems of member states and general acceptance of its authority as the ultimate arbiter in disputes over human rights in Europe."[49] Therefore, Protocol 16 is a brilliant tool for further enhancing cooperation between Council of Europe member states and the ECtHR. This is also a reason to argue that advisory opinions are binding on all Council of Europe members because they can be found in the ECtHR's judgments and decisions, which are binding on all Council of Europe members (so called effect of constitutional radiation – A.N.). Finally, the existing (albeit still modest) practice has convinced us that the European Court in Strasbourg treats these issues as primary, ensuring that decisions are rendered with the shortest feasible timeframe, without jeopardizing its own or the work of national courts and tribunals. All these reasons are sufficient for us to consider that all Council of Europe member states, including of course Serbia, should sign and ratify Protocol 16 to the ECHR.

REFERENCES

BOOKS AND ARTICLES

1. Albansesi, E., *The European Court of Human Rights' Advisory Opinions Legally Affect Non-ratifying States: A Good Reason (From the Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR*, European Public Law, Vol. 21, No. 1, 2022
2. Barać, I, *Surrogacy – A Biomedical Mechanism in the Fight against Infertility*, Annals of the Faculty of Law in Belgrade – Belgrade Law Review, Vol. 71, No. 2

[49] Marinković, T., *Granice slobode političkog udruživanja. Uporednopravna studija*, Dosije, Beograd, 2014, p. 89.

3. Bracken, L., *The ECtHR first advisory opinion: Implications for cross-border surrogacy involving male intended parents*, Medical Law International, Vol. 21, No. 1, 2021
4. Conein, T, *Le protocole No 16 vu par la Convention européenne des droits de l'Homme et la Cour de Cassation*, in: Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droits de l'Homme, Strasbourg, 2019
5. Draškić, M., *Ugovor o surogat materinstvu: između punovažnosti i ništavosti*, in: Zbornik treće regionalne konferencije o obaveznom pravu, Baretić, M; Nikšić, S. (eds.), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2022
6. Đorđević, S., *Protocol 16 to the European Convention on Human Rights and Freedoms*, Facta Universitatis: Series Law and Politics, Vol. 12, No, 2, 2014.
7. Glas, L.; Krommendijk, J., *A Strasbourg Story of Swords and Shields: National Courts' Motives to Request an Advisory Opinion from the ECtHR Under Protocol 16*, European Convention on Human Rights Law Review, Vol. 3, No. 3, 2022
8. Jóźwicki, W., *Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?,* Kużelewska, E; Kloza, D; Kraśnicka, I; Strzyczkowski, F. (eds.), European Judicial Systems as a Challenge for Democracy, European Integration and Democracy Series, Antwerp, 2015
9. Krstić, I.; Marinković, T., *Evropsko pravo ljudskih prava*, Savet Evrope, Strazbur, 2022,
10. Lamarque, E., *The Failure by Italy to Ratify Protocol no. 16 to the ECHR. Left behind but not lost*, The Italian Review of International and Comparative Law, Vol. 1, No. 1
11. Lemmens, K., *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?,* European Constitutional Law Review Vol. 15, No, 4, 2018
12. Marinković, T., *Granice slobode političkog udruživanja. Uporednopravna studija*, Dosije, Beograd, 2014
13. Marinković, T., *Analiza uticaja odluka Evropskog suda za ljudska prava na rad Ustavnog suda Srbije*, in: Odnos Ustavnog suda i sudske vlasti – stanje i perspektive, Beljanski, S; Pajvančić, M; Marinković, T; Valić Nedeljković D. (eds.), CEPRIS, Beograd, 2019
14. Marinković, T., *Serbia - Constitutional Law*, Wolters Kluwer, Alphen aan den Rijn, 2019,
15. Milner, D., *Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road*, ZeuS, Vol. 17, No. 1, 2014
16. Nenadić, B., *O nekim aspektima odnosa ustavnih i redovnih sudova*, in: Nenadić, B. (ed.), Uloga i značaj Ustavnog suda i očuvanje vladavine prava, Ustavni sud, Beograd, 2013
17. Plavšić, N., *Primena prakse Evropskog suda za ljudska prava od strane Ustavnog suda u postupcima po ustavnim* žalbama, in: Ustavna žalba u pravnom sistemu Srbije, Šarčević, E; Simović, D. (eds.), Centar za javno pravo, Sarajevo, 2019
18. Pokuševski, D. (ed.)*, Ljudska prava u Srbiji*, Beogradski centar za ljudska prava, Beograd, 2023
19. Schabas, W., *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford, 2015
20. Žuber, B.; Lovšin, Š., *Judical Dialogue in the light of Protocol No. 16. to the European Convention of Human Rights*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 2, 2019

ECHR

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14, 4 November 1950, ETS 5
2. Explanatory Report to Protocol No. 16. to the European Convention for the Protection of Human Rights and Fundamental Freedoms
3. Guidelines on the Implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
4. Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

ADVISORY OPINIONS AND DECISIONS

1. Advisory Opinion Requested by Conseil d'Etat of Belgium P16-2023-001 ECtHR
2. Advisory Opinion Requested by French Conseil d'Etat P16-2021-002 ECtHR
3. Advisory Opinion Requested by Lithuanian Supreme Administrative Court 016-202-002 ECtHR
4. Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR
5. Advisory Opinion Requested by the Armenian Constitutional Court P16-2019-001 ECtHR
6. Advisory Opinion Requested by the French Court of Cassation P16-2018-001 ECtHR
7. Advisory Opinion Requested by the Supreme Court of Finland P16-2022-001 ECtHR
8. Decision Requested by Supreme Court of Estonia P16-2023-002 ECtHR
9. Decision Requested by Supreme Court of the Slovak Republic P16-2020-001 ECtHR

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Judgement, French Court of Cassation, *No. 648 4-10-2019*
2. The Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije No. 98/2006, 115/2021*

WEBSITE REFERENCES

1. *Analysis: The Strasbourg Court's First Advisory Opinion under Protocol 16* [https://www.echr-blog.com/2019/05/the-european-courts-first-advisory.html], Accessed 17 March 2024
2. Council of Europe, *Protocol No 16*, 2024 [https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214], Accessed 9 March 2024.
3. Council of Europe, *Report of the Group of Wise Persons to the Committee of Ministers*, [https://rm.coe.int/16805d6a73], Accessed 9 March 2024
4. Dzehstiarou, K., Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court

[https://verfassungsblog.de/advisory-opinions-more-cases-for-the-already-overburdened-strasbourg-court/], Accessed 23 March 2024

5. *ECtHR Country Profile – Serbia* [https://www.echr.coe.int/documents/d/echr/cp_serbia_eng], Accessed 21 March 2024
6. *Pregled rada Ustavnog suda Srbije u 2022. godini* [https://www.ustavni.sud.rs/upload/document/pregled_2022_(1)_20230522_090003.pdf], Accessed 21 March 2024
7. Speech by Enrico Albanesi at the ECtHR [https://www.echr.coe.int/documents/d/echr/summary-20231013-albanesi-conference-p16-eng], Accessed 20 March 2024