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THE ECtHR'S ADVISORY JURISDICTION

LAURENCE BURGORGUE-LARSEN

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All for this? When the European Court of Human Rights is seized by legal chill

Laurence Burgorgue-Larsenⁱ

All for this? While for the first time in its consultative history, the European Court of Human Rights (ECtHR) was seized on the basis of a provision that bridges the gap between it and one of the many Conventions adopted under the aegis of the Council of Europe – in this case, the Convention on Human Rights and Biomedicine (the so-called 'Oviedo Convention') (1) – the Court declined, by a majority (23 votes to 4), the invitation to answer certain questions put to it by the Council of Europe's Bioethics Committee (DH-BIO) (2). In order to understand this refusal, it is necessary to consider the procedural context in which this request for an advisory opinion for interpretative purposes was made.

Similarly to other international judicial systems – whether universal (Article 96 of the Charter of the United Nations (3)) or regional (Article 64 of the American Convention (4) and Article 4 of the Protocol establishing the African Court (5)) – the ECtHR has an advisory jurisdiction that arises outside any legal dispute. Article 47(1) of the European Convention on Human Rights (ECHR) is the archetype (6). It states: 'The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and its protocols'. Its content is in line with classical international procedural law where requests for opinions are made by expressly mentioned organs of the international organisation hosting the court in question. In the UN field, the General Assembly and the Security Council (Article 96(1) of the UN Charter) and any 'other organ or specialised agency' of the UN (Article 96(2) UN Charter) may submit requests for advisory opinions to the International Court of Justice (ICJ). The same procedural pattern exists in the inter-American system where, in addition to the bodies mentioned in Chapter X of the OAS Charter (7) (in practice, mainly the Inter-American Commission on Human Rights), States are also entitled to refer cases to the Court of San José in

i. Professor of Law at the Sorbonne Law School (Paris 1).

1. [Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine](#), ETS.No. 164, Oviedo, 4 April 1997.

2. [Decision of the ECtHR \(Grand Chamber\) of 15 September 2021](#), *Request for an advisory opinion under Article 29 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (A47-2021-001).

3. [Charter of the United Nations](#), 1 UNTS XVI, San Francisco, 24 October 1945.

4. [American Convention on Human Rights \('Pact of San José'\)](#), Costa Rica, 11 November 1969.

5. [Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights](#), Ouagadougou, 10 June 1998.

6. [Convention for the Protection of Human Rights and Fundamental Freedoms](#), Rome, 4 November 1950.

7. [Charter of the Organization of American States](#), Bogota, 30 April 1948.

The two opinions adopted on the basis of Article 47 ECHR – both of them on the election of ECtHR members – are not revolutionary; worse, they are not particularly progressive concerning the gender balance within the ECtHR itself

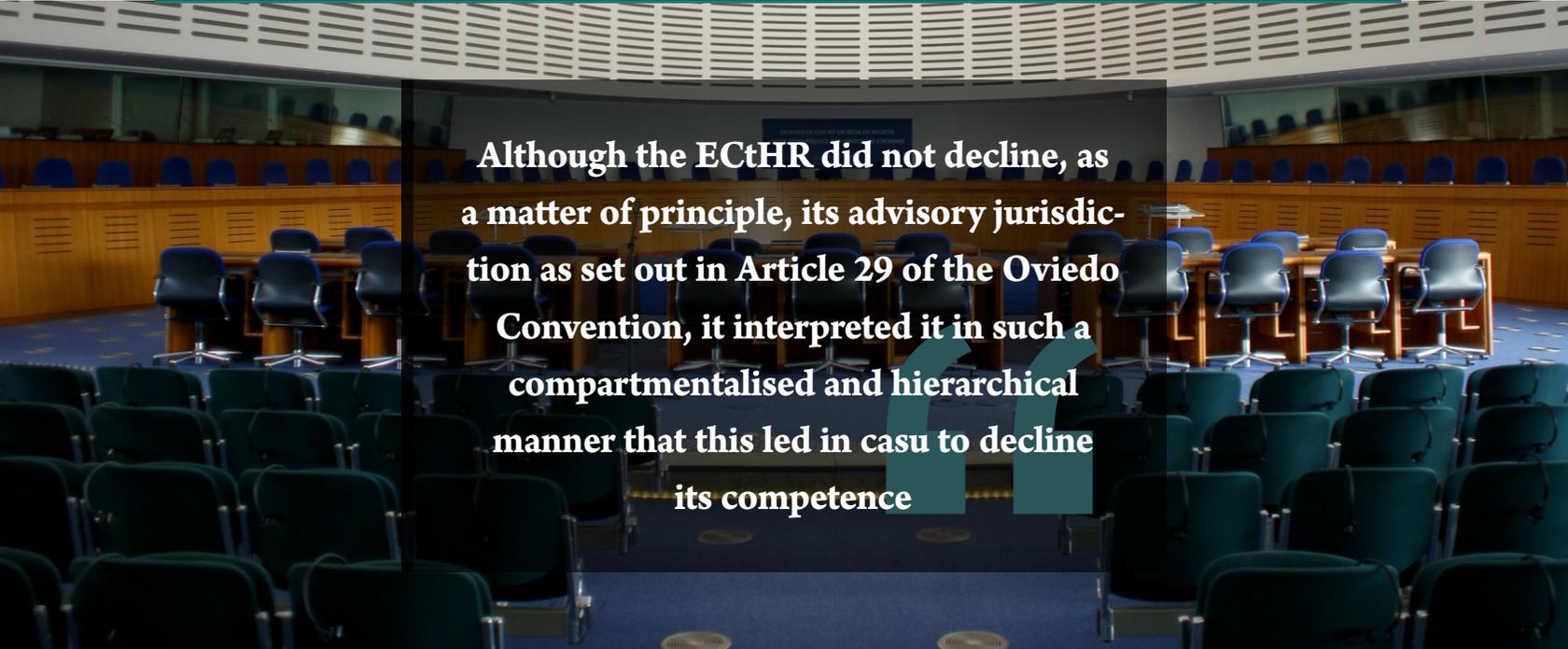
also materially limits the scope of the consultation: ‘Such opinions may not deal with any question relating to the content or scope of the rights and freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers may have to consider following the institution of proceedings under the Convention.’ In other words, its use has been rare and the two opinions adopted on the basis of Article 47 ECHR – both of them on the election of ECtHR members – are not revolutionary (8); worse, they are not particularly progressive concerning the gender balance within the ECtHR itself.

The reader will have understood by now that the Decision of 15 September 2021 was not issued on the basis of Article 47 ECHR, but in accordance with another, specific legal basis, inserted in another Council of Europe Convention. Indeed, Article 29 of the Oviedo Convention expressly establishes the interpretative advisory competence of the ECtHR, which ‘may give, outside any concrete dispute pending before a court, advisory opinions on legal questions concerning the interpretation of this Convention at the request of: - the Government of a Party, after informing the other Parties; - the Committee set up under Article 32 in its composition restricted to the Representatives of the Parties to this Convention, by a decision taken by a two-thirds majority of the votes cast’. Here, it is understood that international procedural classicism is respected: referral to the ECtHR is made by

an advisory capacity. Procedural mimicry is also at work in the African field of human rights protection, where Article 4(1) of the Protocol establishing the African Court allows ‘any Member State of the OAU [AU], of the OAU [AU], of any organ of the OAU [AU] or of an African organisation recognised by the OAU’ to submit requests for advisory opinions. The classic rule is that these requests must not relate to disputes pending before the court referred to, which is established either by case law (ICJ, IACtHR) or by the texts (Article 47(2) ECHR; Article 4(2) Ouagadougou Protocol), in order to avoid any instrumentalisation of the consultative procedure. In this respect, Article 47(2) *in fine* of the ECHR is very explicit; it

Procedural classicism is respected: referral to the ECtHR is made by entities expressly authorised to do so, outside of any dispute and to obtain an interpretation of the provisions of the Oviedo Convention

8. [Opinion of the ECtHR of 12 February 2008](#), Advisory opinion on certain legal questions relating to the lists of candidates submitted for election as judges of the European Court (A47-2008-001); [Opinion of the ECtHR of 22 January 2010](#), Advisory opinion on certain legal questions relating to the lists of candidates submitted for election as judges of the European Court (n°2) (A47-2010-001).



Although the ECtHR did not decline, as a matter of principle, its advisory jurisdiction as set out in Article 29 of the Oviedo Convention, it interpreted it in such a compartmentalised and hierarchical manner that this led *in casu* to decline its competence

entities expressly authorised to do so, outside of any dispute and to obtain an interpretation of the provisions of the Oviedo Convention. This is an inter-conventional bridge for interpretation purposes. This technique is far from being unprecedented. For example, Article 11 of the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women of 9 June 1994 provides that the Inter-American Court may be consulted, either by the Inter-American Commission of Women or by the States Parties, in order to interpret this Convention, the purpose of which is to protect women from all types of violence (9).

It was necessary to set the procedural scene in order to gauge the extent of the ECtHR's very singular analysis. Although it did not decline, as a matter of principle, its advisory jurisdiction as set out in Article 29 of the Oviedo Convention (Decision, paragraphs 41-46), it interpreted it, after many twists and turns, in such a compartmentalised and hierarchical manner (paragraphs 47-54) that this led *in casu* to decline its competence (paragraphs 64-71). Yet the questions asked by the Bioethics Committee concerned an important issue: that of the treatment administered, without their consent, to persons suffering from mental disorders, sometimes in their own interest, sometimes for the protection of third parties.

What can explain such reluctance in the interpretation of inter-conventional bridges within the framework of the 'Greater Europe'? Let us list the hypotheses which, taken together, will no doubt provide the most plausible overall explanation possible. Firstly, it was a 'first' (paragraph 29) and the Court had to determine the procedural rules surrounding the examination of such an application (paragraph 3). It did so by deciding at the outset to reason by analogy. It stated that 'in the absence of rules specifically governing such proceedings, the President of the

9. [Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women](#), Belém do Pará, 9 June 1994.

Court has decided that Chapter XI of the Rules of Court should be applied'. Accordingly, the Contracting Parties were informed that they could submit 'written observations *on the application*', in accordance with the wording of Rule 84(2) of the Rules of Procedure (emphasis added). However, the consultation of States was surreptitiously extended, as they were not only invited to present their views on the questions posed by the Bioethics Committee, but also on 'their relevant domestic law and practice' concerning involuntary treatment of the mentally ill. In all, twenty-five States – some of which are not parties to the Oviedo Convention, such as Andorra, Armenia, Azerbaijan, Italy, Poland and Russia – took care to present their observations, both on the Court's jurisdiction and on the merits. This revealed the extent of the division between the States on these two issues. This is undoubtedly a second element that helps to explain the ECtHR's solution: that of a fractured political context. It is striking to note that the divisions appeared from the outset on the question of its competence to interpret the Oviedo Convention. The Grand Chamber could have been less prolix, presenting in an extremely synthetic manner the observations of the States and civil society associations – an approach that is its own with regard to the mechanism of Protocol No. 16 to the ECHR (10). (11) However, having distinguished this preliminary ruling procedure from the classic advisory mechanism of Article 47 (ECHR) and Article 29 (Oviedo Convention), it opted for a comprehensive presentation of all points of view (paragraphs 37-40). By playing this card, the ECtHR decided to let the audience see the legal fractures running through the foreign legal policies of all Council of Europe Member States (whether or not they are parties to the Oviedo Convention). In doing so – in the general political context of State mistrust – it considerably limited its room for manoeuvre. In other words, it allowed not only the pressure exerted by States to show through, but also its own sensitivity, not to say deference, to that pressure (as we shall see below). In any case, could this be the second reason for such a restrictive approach? To show the States that the ECtHR takes their views seriously? It is difficult, without being an insider, to say for sure...

The ECtHR allowed not only the pressure exerted by States to show through, but also its own sensitivity, not to say deference, to that pressure

At this stage, let us detail the arguments put forward by the Governments as part of their 'judicial policy', in order to understand which points of view were sometimes rejected and sometimes accepted by the Grand Chamber. Firstly, it should be stated at the outset that one cannot help but feel dizzy when one reads the observations submitted to the Court when it came to interpreting Article 29 of the Oviedo Convention. This clause, which expressly provides for the jurisdiction of the ECtHR, could not be clearer, as the four dissenting judges – the Belgian (Lemmens), Bulgarian (Grozev), British (Eicke) and Maltese (Schembri Orland) judges – rightly said. However, this contrasts with the approaches deployed by some of the States to which the Court decided to give astonishing visibility, and even, no more and no less, a strategic platform of first choice.

10. [Protocol No. 16](#) to the ECHR, ETS No. 214, Strasbourg, 2 October 2013.

11. Laurence Burgorgue-Larsen, '[Le Protocole n°16, entre théorie et réalité du dialogue judiciaire](#)', *Revue Québécoise de droit international*, Hors Série 2020, 219-254.

The most radical – or is it the most far-fetched? – was the one presented by Andorra, Azerbaijan, Poland and Russia (non-party to the Oviedo Convention), as well as Turkey (contracting party), which considered, as a matter of principle, that the ECtHR had no competence *ratione materiae* to interpret Conventions other than the ECHR (paragraph 37), and that only its reform through the adoption of a protocol would be relevant... Fortunately, the ECtHR hardly followed this interpretation (paragraphs 41-46). It aligned itself with the reasonable position of the majority of States (Estonia, Finland, France, Italy, Latvia, Luxembourg, the Netherlands, Norway, Portugal, Romania, the Czech Republic and Ukraine). It even adopted the argument of those who ‘maintained that Article 29 [should] be regarded as a relevant rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention’ (paragraphs 38 and 42), according to which the Court ‘must, when interpreting the Convention, take into consideration any rule of international law applicable to the relations between the Contracting Parties’, in this case the provisions of Article 29 of the Oviedo Convention. The ECtHR went on to make a key point: ‘While this principle of interpretation has essentially been applied to the normative clauses of the Convention, the Court considers that it is not without relevance to other types of provisions, including those relating to the Court’s jurisdiction’ (paragraph 42). The ECtHR further highlighted the synergy between the Council of Europe treaties – of which the Oviedo Convention is a part – whose aim is ‘to achieve a greater unity between its members for the purpose of safeguarding and developing human rights and fundamental freedoms’ (paragraph 44). Here it made it clear that the treaties adopted under the aegis of the great Pan-European organisation were to be interpreted in a convergent manner. One might paraphrase the emblematic formula of the Court of San José (using the *Inter-American Corpus Iuris* expression), considering that the Strasbourg Court pointed to the existence of a *European Corpus Juris*.

The reader, at this stage of the analysis, is relieved. The Grand Chamber decided to relegate to the storehouse of accessories an argument that made the ECtHR’s jurisdiction dependent on the content of the European Convention (as drafted in 1950), to the point of wanting to freeze all procedural and normative improvements within the framework of the ‘family’ of treaties adopted under the aegis of the Council of Europe. Similarly, it did not accept the argument that reform of the ECHR was the only possible solution, as this would have meant ignoring international law-making practices which are designed to advance the law through the use of arbitration clauses (*clauses compromissaires*). Such clauses (such as Article 29 of the Oviedo Convention) are intended not only to compensate for the absence of *ad hoc* clauses in previous treaties, but also to ‘rationalise’ the advisory function by entrusting it to the regional jurisdiction of the continental organisation. It should also be noted, in passing, that many specialised treaties in the Inter-American field provide for the jurisdiction of the Court of San José to *apply*, in the framework of its judicial function, some specialised treaties (12).

The Court’s only ‘temerity’ was to assert its principled competence to interpret the Oviedo Convention by means of the advisory mechanism of Article 29. In contrast, the result of its subsequent argumentation reflected a very formalistic and conservative approach defended by the Armenian, Greek, Polish and Turkish governments (paragraph 39), as well as by the association *Validity* (paragraph 40). Those interveners presented an interpretation consisting of importing the limits set out in Article 47(2) ECHR into the scope of Article 29 of the Oviedo Convention. In eight paragraphs (47-58), the Grand Chamber presented an analysis based on the pre-

12. Laurence Burgorgue-Larsen, *Les 3 Cours régionales des droits de l’homme in context. La Justice qui n’allait pas de soi*, Paris, Pedone, 2020, 167 et seq.

The Court's only 'temerity' was to assert its principled competence to interpret the Oviedo Convention by means of the advisory mechanism of Article 29

paratory work of the Oviedo Convention (paragraphs 47-48); on a compartmentalised approach to progressive interpretation (that of the 'living instrument'), refusing to apply it to the Oviedo Convention (paragraph 49 *in fine*) and, *last but not least*, on a hierarchical view of the links between its contentious function ('which is its pre-eminent function and [which] must be carefully preserved') and its advisory function. Accordingly, in paragraph 54 *in fine*, it asserted its position that it 'cannot exercise its functions in the context of the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47(2) of the Convention (also found in the genesis of Article 29), which is to

preserve its primary judicial function as an international court administering justice under the Convention.' And yet, a completely different analysis was possible...as presented by one Government (but whom the Court did not want to name expressly). It consisted in arguing that 'the relationship between the two Conventions (...) [was] governed by Article 30 of the Vienna Convention, which concerns the application of successive treaties relating to the same subject matter' (paragraph 38). The latter interpretation was interesting because it was possible 'to infer that the strict limits which apply to the advisory competence of the Court under Article 47 of the Convention and which are fully justified in this context, must not apply to Article 29 of the Oviedo Convention, otherwise the manifest intention of the drafters of the latter would be ignored and the effectiveness of Article 29 compromised'. *What a missed opportunity!*

From this particularly restrictive analytical framework – in which it transposed, no more and no less, the limitations of Article 47(2) ECHR to Article 29 of the Oviedo Convention – the Grand Chamber came to the merits and considered that the first question posed by the Bioethics Committee did not fall within its competence (paragraph 70); in the process, it played on procedural economy in order to refuse to answer the second question, which was 'closely related' to the first one (paragraph 71). What were the two main questions that the Grand Chamber refused to answer? What was so problematic about their formulation? The Bioethics Committee wanted clarification of Articles 7 and 26 of the Oviedo Convention. The first provision states the principle that involuntary treatment (namely treatment administered without the patient's consent) is not possible, unless it is necessary to protect the patient's health and 'subject to protective conditions prescribed by law, including supervision and control procedures and remedies'. The Committee wanted to know what were the minimum requirements of protection that States should provide in their legislation. As for the second provision, it allows for possible involuntary treatment, but this time in the name of traditional restrictions on rights in a democratic society (public safety, the prevention of criminal offences, the protection of public health or the protection of the rights and freedoms of others). At this stage, the Committee wanted to know whether the safeguards mentioned in Article 7 applied *mutadis mutandis* to the situation in Article 26. The Bioethics Committee made no secret of the

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fact that such questions were part of the debate on the possibility of adopting an Additional Protocol on involuntary placement and treatment.

The Court declined jurisdiction on the basis of three arguments, the last two of which directly echoed the limits set by Article 47(2) ECHR. The first argument was that of the room for manoeuvre that the States had deliberately granted themselves in drafting Article 7 (which, as we have seen, refers to national legislation to detail the ‘conditions of protection’) (paragraph 65); the second was the refusal of an interpretation that would amount to reforming the Oviedo Convention through ‘additions, improvements or corrections’ that would ‘modify its substance’ (paragraph 66), especially when the process of adopting new standards through additional protocols is ‘an ongoing process’ (paragraph 67); finally, the third concerns the misuse of its ‘pre-eminent contentious jurisdiction’: in answering the Bioethics Committee’s questions, its ‘response would relate at least as much to the [European] Convention as to the Oviedo Convention, which would risk “hampering” it in its litigation function’ (paragraph 68).

Needless to say, with such arguments, the ECtHR transformed the consultative procedure of Article 29 of the Oviedo Convention into a ‘stillborn’ consultative procedure. The constraints it imposed are such that the Bioethics Committee, like the States, will hardly be inclined to initiate a new consultative referral. And yet, a completely different approach was possible, based in particular on Article 53 ECHR, as three of the four intervening organisations pointed out (paragraph 63). This provision is, incomprehensibly, totally underused by the ECtHR. Let us recall that it is a so-called ‘non-regression clause’ which prohibits the interpretation of rights ‘as limiting or prejudicing the human rights and fundamental freedoms which may be recognised in accordance with the laws of any Contracting Party or any other Convention to which that Contracting Party is a party’. It

should also be noted that it is expressly echoed in Article 27 of the Oviedo Convention, entitled 'wider protection', which reads as follows: “Nothing in this Convention shall be interpreted as limiting or prejudicing the right of each State Party to grant more extensive protection with regard to the application of biology and medicine than that provided for in this Convention.’

In any case, the ECtHR, instead of declaring itself competent and examining the international consensus as manifested through the adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) (13) – ratified by all the States parties to the Oviedo Convention and by 46 of the 47 States parties to the ECHR, and which completely revisits the rights of persons suffering from mental disorders by prohibiting treatment without consent –, preferred to play the deferential card of incompetence, resulting in a race to the bottom contrary to Article 53 ECHR. There was nothing to prevent it from interpreting the Oviedo Convention in the light of the UNCRPD in order to promote as much as possible their harmonious interpretation.

However, such argumentative efforts were in the end totally destroyed by an *obiter dictum* revealing the ECtHR's own embarrassment (!). Let us read paragraph 69 of the Decision, which *in fact* answers, in passing, the Committee's questions affecting, in our opinion, the authority of its entire demonstration:



13. [United Nations Convention on the Rights of Persons with Disabilities](#), New York, 13 December 2006.

‘The Court would *nevertheless* make the following observation, given the common ground between the two treaties that is particularly evident in the area that is the subject matter of the DH-BIO’s request. Despite the distinct character of the Oviedo Convention, the requirements for States under its Article 7 will in practice be concurrent with those under the Convention, it being recalled that at present all of the States having ratified the former are also bound by the latter. Accordingly, the safeguards in domestic law that correspond to the “protective conditions” of Article 7 of the Oviedo Convention need to be such as to satisfy, at the very least, the requirements of the relevant provisions of the Convention, as developed by the Court through its case-law. In relation to the treatment of mental disorder, that case-law is extensive. Moreover, it is characterised by the Court’s dynamic approach to interpreting the Convention, which in this field is guided inter alia by evolving legal and medical standards, national and international. Therefore, the competent domestic authorities should ensure that, as a minimum, national law is and remains fully consistent with the relevant standards under the Convention, including those that impose positive obligations on States.’ (Emphasis added).

The Court ends up saying what it tried so hard not to say...*All for this?*

34. See also the commentary of Prof. R. Caranta, ‘Knock, and it shall be opened unto you: Standing for non-privileged applicants after *Montessori*’ [Common Market Law Review](#), (2021) vol 58, nr 1. pp. 163 – 186.

The European Court of Human Rights' Advisory Opinion on the Oviedo Convention: Some Disharmonies in the Court's Architecture

Victor Ferreres Comellaⁱ

On 15 September 2021 the European Court of Human Rights ruled for the first time on a request for an advisory opinion (1) under Article 29 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the so-called 'Oviedo Convention'. (2) The opinion had been requested by the Council of Europe's Committee on Bioethics. Although the Court upheld its own authority to issue advisory opinions under Article 29 of the Oviedo Convention, it followed a very narrow understanding of the types of questions it can address through this mechanism. According to the Court, its advisory jurisdiction under Article 29 does not empower it to interpret any substantive provisions or jurisprudential principles of the European Convention on Human Rights (3). As a result, the Court concluded in the particular instance that it could not answer the two questions posed by the Committee on Bioethics, although the Court offered some guidance in a brief paragraph at the end of its decision.

In its decision the Court means to emphasize the constitutional quality of the European Convention on Human Rights and its Protocols

In her contribution 'All for this? When the European Court of Human Rights is seized by legal chill', Professor Laurence Burgogue-Larsen offers a very good description of the ruling, as well as a sharp and convincing criticism of the arguments advanced by the Court to justify its various holdings. I will here try to offer an additional angle from which to analyse the underlying problem.

As I see it, in its decision the Court means to emphasize the constitutional quality of the European Convention on Human Rights and its Protocols. These are the foundational documents where the role of the Court is fixed. Other international agreements, such as the Oviedo Conven-

i. Professor of Constitutional Law at Pompeu Fabra University (Barcelona).

1. [Decision of the ECtHR \(Grand Chamber\) of 15 September 2021](#), Request for an advisory opinion under Article 29 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (A47-2021-001).

2. [Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine](#), ETS. No. 164, Oviedo, 4 April 1997.

3. [Convention for the Protection of Human Rights and Fundamental Freedoms](#), Rome, 4 November 1950.

tion, can expand the jurisdiction of the Court by adding new tasks, but this expansion cannot undermine the central function the Court is expected to perform in the light of the basic texts. This constitutional reading is similar to the approach often taken by jurists in the domestic sphere. The national constitution may establish a constitutional court or a supreme court, for example, entrusted with certain missions. Sometimes the constitution empowers the ordinary legislature to augment the tasks assigned to such courts. There is a common understanding, however, that the legislature does not have unfettered authority to enlarge the jurisdiction of those courts. In particular, it cannot radically transform the nature of a given court as conceived by the constitutional framers. We can read the European Court of Human Rights to be crafting an analogous doctrine in the Strasbourg sphere.

**The question inevitably arises:
Is Article 29 of the Oviedo
Convention acceptable, given
the basic institutional framework?
If we focus on Article 47 of the
European Convention, the answer
is probably going to be no. If we
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the answer is likely to be yes.
The Court opts for the former**

The Court insists that its ‘preeminent function’ as defined in the foundational constitutional documents is to be carried out in the context of its contentious jurisdiction. We can agree on this. But what follows from it? It is not easy to draw the consequences. The European Convention judicial system was not hard to characterize and make sense of before Protocol No. 16 (4) came into being in 2018. There was then a tight fit between the contentious and advisory responsibilities of the Court. The plan was that the Court would interpret the rights enshrined in the Convention in the context of its contentious jurisdiction. Consistently with this, Article 47 of the Convention provided that advisory opinions should not deal with questions relating to the content and scope of the rights defined in the Convention, or with questions which the Court (or the Committee of Ministers) might consider in consequence of proceedings that could be instituted in accordance with the Convention. The rationale for this institutional scheme was that the Court should not prejudge in an advisory opinion an issue that could later be raised in a specific case. When Protocol No. 16 was later adopted, however, a disharmony was introduced in the Court’s architecture. The Court became empowered to render advisory opinions on questions relating to the interpretation and application of Convention rights posed by the highest national courts in the context of concrete controversies. The upshot was that the original justification for the extremely narrow scope of the Court’s advisory jurisdiction under Article 47 was undermined.

4. [Protocol No. 16](#) to the ECHR, ETS No. 214, Strasbourg, 2 October 2013.

Court's position in 1995 was very plausible indeed, in a world where Protocol No. 16 didn't exist. In the current situation, however, the Court's position might need to be reconsidered



Here enters the Oviedo Convention, which came into effect in 1999. In its decision the Court is bound to deal with the underlying constitutional friction. Article 29 of the Oviedo Convention confers on the Court the authority to render advisory opinions concerning the rights enshrined in the said Convention. These rights are not disconnected from the rights announced in the European Convention on Human Rights and its Protocols. The question inevitably arises: Is Article 29 of the Oviedo Convention acceptable, given the basic institutional framework? If we focus on Article 47 of the European Convention, the answer is probably going to be no. If we instead focus on Protocol No. 16, the answer is likely to be yes. The Court opts for the former. It maintains that it cannot address questions involving the rights guaranteed in the Oviedo Convention, given the narrow scope of the Court's advisory jurisdiction specified in Article 47.

The Court is aware, of course, of the existence of Protocol No. 16, which is pulling in the opposite direction. In paragraph 53 of its decision, the Court mentions Protocol No. 16 and tries to draw a contrast between this protocol and Article 29 of the Oviedo Convention. The Court does not say much to highlight the relevant differences, but it does point out that Protocol No. 16 is part of the treaties 'that make up the Convention system', while the Oviedo Convention is not. Translated into constitutional language: Protocol No. 16 is part of the constitutional rules defining the Court, whereas the Oviedo Convention is an 'ordinary' norm that must comport with the constitutional rules. This distinction in the degree of normative authority is certainly plausible, but the problem is that the constitutional rules defining the Convention system are themselves internally disharmonic. As just noted, the original justification for the limited scope of the Court's advisory jurisdiction under Article 47 does not cohere with the reasons animating the introduction of Protocol No.16.

It is worth mentioning that the initial draft of the Oviedo Convention provided that national courts would be allowed to request preliminary rulings on the interpretation of rights. The Court, when commenting on the draft in 1995, suggested that the preliminary reference mechanism should be eliminated, the reason being that the interpretation given in a Court's opinion 'might hamper the Court at a later stage if it was called upon to rule under the Human Rights Convention on the facts of the case that prompted the request'. The framers of the Oviedo Convention duly followed the Court's suggestion and eliminated the preliminary reference procedure in the final text. The Court's position in 1995 was very plausible indeed, in a world where Protocol No. 16 didn't exist. In the current situation, however, the Court's position might need to be reconsidered.

Indeed, if Protocol No. 16 were awarded more gravitational force in the future, as an increasing number of countries choose to ratify it, the jurisprudence laid down by the Court in its decision on the Oviedo Convention should be adjusted, in order to embrace a broader reading of the scope of its article 29 advisory jurisdiction, in the direction advocated by Professor Burgorgue-Larsen in her illuminating piece.

News Highlights

Week 15 to 19 November 2021

Commission's Infringement Package October 2021

Monday 15 November

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The European Commission published its package of infringement decisions for the month of October that, among other things, includes the Commission's referral of Romania and Hungary to the Court of Justice for their failure to comply with previous judgments by the said Court.

EU views on outcome of COP26

Monday 15 November

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European Commission President Ursula von der Leyen delivered a statement on the COP26, which ended with the approval of an agreement demanding countries to intensify their efforts in fighting climate change in line with the Paris Agreement and established numerous parallel deals on specific issues such as methane emissions or financing.

Vacancy position for référendaire at the General Court

Tuesday 16 November

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A vacancy announcement was made for a référendaire to join the Third Chamber at the General Court of the Court of Justice of the European Union (Luxembourg).

Ryanair's appeal against General Court judgment confirming Austrian aid officially published

Monday 15 November

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Official publication was made of Ryanair DAC and Laudamotion GmbH's appeal against the General Court's judgment in *Ryanair and Laudamotion v Commission* (T-677/20), by which the aid granted by Austria to Austrian Airlines AG was confirmed to be compatible with State aid rules.

Judge O'Leary elected Vice-President of European Court of Human Rights

Tuesday 16 November

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Judge Siofra O'Leary was elected as Vice-President of the European Court of Human Rights. The Court has two Vice-Presidents, who also preside over Sections, the other three Sections each having a Section President.

ECtHR clarifies requirements for seizure and examination of lawyers' correspondence under Article 8 ECHR

Tuesday 16 November

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The European Court of Human Rights clarified in *Särgava v. Estonia* how the right to private, family life and the home applies to the information held by lawyers in respect of their clients.

Hungary's criminalisation of legal aid activities for refugees violates EU law, Court of Justice rules

Tuesday 16 November

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The Court of Justice ruled in *Commission v Hungary* (C-821/19) that by adopting a legislative reform in 2018 that criminalised activities intended to provide advice and counsel to applicants for international protection, Hungary has failed to fulfil its obligations under EU law.

Eric Gippini Fournier appointed as Hearing Officer for Commission's competition cases

Tuesday 16 November

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The European Commission has appointed Eric Gippini Fournier as Hearing Officer for competition cases and he will join Hearing Officer Dorothe Dalheimer as of 1 December 2021.

Ombudsman calls for modernisation of Access to Documents Regulation

Wednesday 17 November

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The European Ombudsman publicly called to modernise the Access to Documents Regulation 1049/2001 to place it in line with the current digital reality.

Court of Justice: European Arrest Warrant provisions in EU-UK Withdrawal and Trade Agreements are binding on Ireland

Tuesday 16 November

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The Court of Justice held in *Governor of Cloverhill Prison and others* (C-479/21 PPU) that the provisions for the continuation of the European Arrest Warrant in the UK contained in the Withdrawal Agreement and Trade and Cooperation Agreement between the EU and the UK are binding on Ireland.

Polish system of secondment of judges subject to the discretion of Justice Minister precluded by EU law

Tuesday 16 November

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The Court of Justice ruled in *Criminal proceedings against WB and Others* (joined cases C-748/19 et al) that the current legal regime in Poland allowing for the Justice Minister, who is also the General Prosecutor, to second judges and terminate them at his discretion is precluded by EU law.

Parliament and Council agree on 2022 EU budget

Wednesday 17 November

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The European Parliament and the Council of the EU reached an informal agreement on the EU budget for 2022, setting commitments at 169.5 billion euros and payments at 170.6 billion euros.

Council launches new PESCO projects

Wednesday 17 November

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The Council of the EU adopted a decision updating the list of projects to be undertaken under the EU permanent structured cooperation, adding 14 new projects to the list of the 46 existing ones since 2017.

Commission proposes three initiatives to curb deforestation, facilitate waste management and protect soils

Wednesday 17 November

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The European Commission has adopted three new proposals to halt deforestation, innovate sustainable waste management and improve and restore soils, as part of its efforts to accomplish the European Green Deal and the EU Biodiversity Strategy for 2030 objectives.

ECtHR: National authorities' discretion regarding relationship between State and religion must conform to ECHR standards, but speculative applications are inadmissible

Thursday 18 November

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The European Court of Human Rights issued an inadmissibility decision in *Shortall and Others v. Ireland*, in which it was claimed that the religious declarations required to take up certain top public offices in Ireland are contrary to the freedom of thought, conscience and religion. The action was dismissed because applicants lacked the condition of 'victims' and their claims were merely speculative.

Commission challenges Council's designation of a Member State's representative to sign a Protocol to a fisheries agreement: action published

Wednesday 17 November

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In *Commission v Council* (C-551/21), the Court of Justice will hear an action for annulment against a provision of Council Decision 2021/1117 on the signing, on behalf of the EU, of the Implementing Protocol to the EU-Gabon Fisheries Partnership Agreement.

Court of Justice publishes call for applications from Irish-Gaelic Lawyer-Linguists

Thursday 18 November

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Official publication was made of a notice of open competition for the position of Irish Gaelic speaking Lawyer-Linguists to join the Court of Justice's Translation Unit in Luxembourg.

AG Campos Sánchez-Bordona: general and indiscriminate retention of traffic and location data only allowed for serious threats to national security

Thursday 18 November

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Advocate General Campos Sánchez-Bordona delivered his Opinion in three cases concerning the conditions for the general and indiscriminate of traffic and location data, advising the Court to rule that it is only permitted in the event of a serious threat to national security.

AG Collins: general presumption of confidentiality should be applied to documents in sui generis calls for applications

Thursday 18 November

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Advocate General Collins delivered his Opinion in *ViaSat v Commission* (C-235/20 P), advising the Court to reject the appeal put forward by ViaSat against the General Court's judgment which dismissed ViaSat's action challenging, inter alia, the Commission's refusal to grant it access to competitor's documents.

State aid Temporary Framework prolonged until June 2022

Thursday 18 November

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The European Commission decided to prolong until 30 June 2022 the State aid Temporary Framework, which was set to expire on 31 December 2021.

Ombudsman: Commission should require declarations of interest of experts invited in their personal capacity for stakeholder workshop

Friday 19 November

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The European Ombudsman found in a case concerning the Commission's ongoing review of the criteria for assessing environmental risks in pesticides, that the Commission should require declarations of interest of experts invited in their personal capacity for stakeholder workshops that concern implementation of EU legislation, programmes and policies.

Commission adopts communication on competition policy's contribution to green and digital transitions

Thursday 18 November

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The European Commission adopted a Communication on a competition policy fit for new challenges, in which it outlines the contributions of its competition policy to the green and digital transitions, as well as to a resilient Single Market.

Preliminary Report on EU carbon market published by ESMA

Friday 19 November

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The European Securities and Markets Authority published its Preliminary Report on the EU carbon market and derivatives thereof, in order to help the Commission to assess whether certain trading behaviours would require regulatory actions.

Conserve Italia fined 20 million euros for participating in canned vegetables cartel

Friday 19 November

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The European Commission fined Conserve Italia Soc. coop. agricola and its subsidiary Conserves France S.A. a total of 20 million euros for their participation in the canned vegetables cartel for 13 years.

Insights, Analyses & Op-Eds

Frozen means frozen: Creditors of a person or entity subject to an asset freeze cannot initiate protective measures without prior authorization by the national authority

by Celia Challet

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Op-Ed on Court of Justice's judgment in *Bank Sepah* (C-340/20), ruling that a creditor of a person or entity subject to the freezing of funds and economic resources under the Common Foreign and Security Policy cannot initiate protective measures to secure the satisfaction of its debt claims without prior authorization by the competent national authority.

To Derive or not to Derive? On the Due Deference of the Common European Asylum System to the International System for Refugee Protection in *LW* (C-91/20)

by Janine Silga

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Op-Ed on the Court of Justice's ruling in *LW* (C-91/20), in which the Court ruled in favour of extending the refugee status to the minor child whose nationality differs from her parent refugee. The author focuses on the reasons for divergence between the Opinion of the Advocate General and the ruling of the Court.

***Energieversorgungscenter Dresden-Wilschdorf* (C-938/19): Establishing the boundaries of a cogeneration installation for the free allocation of emission allowances**

by Lucila de Almeida and Viola Cappelli

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Op-Ed on the Court of Justice's judgment In *Energieversorgungscenter Dresden-Wilschdorf* (C-938/19), clarifying the calculation method applicable for the free allocation of emission allowances and, in the authors' opinion, providing for the expansive application of the emission trading system to cogeneration installations, while simultaneously avoiding jeopardizing the virtuous effect on the environment.



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Analysis: "First Steps Test for the New EU Regime post-Brexit – G. Baker's Opinion in Governor of Cleveland Prison and Others (C-72/21 EPP)" by Margaret Lingard

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AG Collins: general presumption of confidentiality should be applied to documents in sui generis calls for applications

Finding of civil liability against an author for de-famation of certain individuals compatible with presumption of innocence and freedom of expression, ECHR rules

AG Campos Sánchez-Bordona: general and indiscriminate retention of traffic and location data only allowed for serious threats to national security

Amended technical specifications and rules for trust framework for EU Digital COVID Certificate published

ECHR: National authorities' discretion regarding relationship between State and religion must conform to ECHR standards, but speculative applications are inadmissible

Court of Justice publishes call for applications from Irish-Gaelic Lawyer-Linguists

Commission imposes anti-dumping duties on certain imports from China, India and Indonesia

European Green Deal: Commission proposes three initiatives to curb deforestation, facilitate waste management and protect soils

Commission challenges Council's designation of a Member State's representative to sign a Protocol of a fisheries agreement: action published

Court of Justice to rule on whether civil identity of users data is subject to prior review requirement and compatible with EU law

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